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# The Principle of Orality: An Analysis of the Principles Governing the Prevalence of Direct Oral Testimony in the English Adversarial Trial System and the Impact of Reforms to Reduce its Status

Susan Lazer

A thesis submitted to the University of Huddersfield in partial fulfilment of the requirements for the degree of Doctor of Philosophy

The University of Huddersfield, School of Law

August 2020

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# Table of Contents

<b>Introduction .....</b>	<b>6</b>
Summary .....	6
Approach to the Study: The Research Question .....	8
The System of Adversarial Trials and the Principal of Orality .....	10
Approach of Civil Courts to Witnesses of Fact .....	11
The Attitude Towards Receipt of Evidence From Experts .....	13
The Introduction of Special Measures in the Criminal Justice System for the Receipt of Oral Testimony .....	15
The Future of the Principal of Orality and Conclusions .....	19
Methodology.....	20
<b>Chapter 1 – The Receipt of Oral Testimony .....</b>	<b>25</b>
1.1 – Introduction .....	25
1.2 – The Principle of Orality in the English Trial .....	27
1.3 – Adversarial v Inquisitorial .....	35
1.4 – Perceptions of the Traditional Trial .....	40
1.5 – The Law of Evidence .....	46
1.6 – Conclusion .....	51
<b>Chapter 2 – The Civil Process .....</b>	<b>52</b>
2.1 – Introduction .....	52
2.2 – The Civil Trial Procedure Prior to the Woolf Reforms .....	53
2.3 – A New Era of ‘the Overriding Objective’ and the Pursuit of Optimum Efficiency (Woolf and Jackson) .....	56
2.4 – The Continuing Development of the Civil Procedure Rules .....	62
2.5 – Case Management and the Effect of the Track Allocation on the Principle of Orality .....	65
2.6 – At All Costs .....	68
2.7 – Evidence in Civil Proceedings .....	72
2.8 – Categories of Witness in Civil Proceedings .....	77
2.9 – Conclusion .....	80
<b>Chapter 3 – The Attitude Towards the Receipt of Evidence from Experts .....</b>	<b>81</b>
3.1 – Introduction .....	81
3.2 – The Receipt of Expert Evidence in Civil Litigation .....	82
3.3 – The Place of Experts in the Litigious Environment .....	83
3.4 – The Continuing Development of the Use of Experts in the Criminal Procedure Rules .....	90
3.5 – Conclusion .....	102
<b>Chapter 4 – The Introduction of Special Measures in the Criminal Justice System for the Receipt of Oral Testimony .....</b>	<b>103</b>
4.1 – Introduction .....	103
4.2 – The Special Measures .....	104
4.3 – The Effect of the Principle of Orality in Delays and Court Process .....	140

4.4 – Work in Progress .....	142
4.5 – Conclusion .....	149

**Chapter 5 – Developments in Trial Procedure and the Future of the Principle of Orality ..... 151**

5.1 – Introduction .....	151
5.2 – Testing Competence .....	152
5.3 – Achieving Best Evidence .....	157
5.4 – A Case for Balance: A Fair Trial for the Accused .....	159
5.5 – Article 6 of the ECHR – The Right to a Fair Trial .....	161
5.6 – The Jeffrey Review .....	162
5.7 – Pigot Unfulfilled .....	164
5.8 – A Fair Test .....	169
5.9 – No Way to Speak to a Child: Ensuring Appropriate Questioning at Court .....	170
5.10 – Testing not Trickery .....	173
5.11 – The Approach of the Bar .....	177
5.12 – The Broader Legal Community .....	181
5.13 – Conclusion .....	182

**Chapter 6 – Conclusions ..... 184**

6.1 – The Original Purpose of the Principle of Orality .....	185
6.2 – Further Developments in Civil Proceedings and the Drive Towards Online Systems .....	186
6.3 – A plethora of Approaches to Expert Evidence .....	189
6.4 – Evolution or Revolution? More Variations on a Theme .....	190
6.5 – The Continuing Need for Fundamental Review in the Receipt of Evidence from Vulnerable and Intimidated Witnesses .....	192
6.6 – Truth Matters .....	193
6.7 – The Way Forward .....	195

## **Abstract**

The system of adversarial trials and the principle of orality in the giving of testimony by witnesses does little to encourage the giving of evidence by the most robust witness yet in its unaltered form provides the basis upon which many of the decisions in the English courts have traditionally been made. There has been a growing recognition that the orthodox trial system must be reviewed and a system allowing for the giving of evidence by other means constructed within it. The continuing review of how evidence should be received to determine a fair outcome does not link the underlying purpose of the principle of orality with the numerous circumstances in which oral evidence may be modified for a variety of reasons. The impact across both civil and criminal proceedings is considered, and the effect of incremental change demonstrated. A model for future dispute resolution and fact finding is developed.

# INTRODUCTION

## Summary

The system of adversarial trials and the principle of orality in the giving of testimony by witnesses does little to encourage the giving of evidence by the most robust witness, yet, in its unaltered form provides the basis upon which many of the decisions in the English courts have traditionally been made. There has been a growing recognition that the orthodox trial system must be reviewed, and a system allowing for the giving of evidence by other means constructed within it.

Lord Devlin's remark that 'the centrepiece of the adversary system is the oral trial',<sup>1</sup> centres on the understanding that the witness should give a factual account from direct knowledge, that is capable of being tested. The three-stage process for the giving of evidence embedded within the system of criminal justice in an adversarial framework sets out the classic example of a formalised mechanism for this process. This comprises of evidence-in-chief; cross-examination and re-examination. Each stage of that process would normally take place in open court and be the subject of scrutiny by a judge and, where appropriate, jury. But even in criminal cases, where the burden of proof to demonstrate guilt is appropriately high, is it really necessary or desirable for this always to be in person and for the witness to be tested by cross-examination? The perception that the process of questioning witnesses in open court is superior is one found in the Anglo-American common law orthodoxy. This view has been questioned 'Alleged superiority of oral testimony is not universally accepted. Like historians, continental jurisdictions prefer documentary sources'.<sup>2</sup>

There is a wealth of information setting out the circumstances in which the principle of orality may be disregarded or altered to such an extent that its impact is very significantly eroded. Differing approaches have been taken dependent on whether the trial process is

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<sup>1</sup> Devlin, P *The Judge*, OUP 1979 p.54

<sup>2</sup> McEwan, "J Documentary Hearsay Evidence-Refuge for the Vulnerable Witness?" (1989) Crim LR 629

taking place in a civil or criminal forum. Significant analysis<sup>3</sup> has already been undertaken on the reduction in the role played by witnesses giving evidence in the traditional format. However, that analysis focuses on specific proceedings rather than considering the validity and legitimacy of the principle of orality across all hearings. The contribution of this thesis is adding to the continuing review of how evidence should be received to determine a fair outcome, by providing a link between the underlying purpose of the principle of orality with the numerous circumstances in which oral evidence may be modified for a variety of reasons. The reasons for those modifications vary from expediting proceedings to reducing cost and, perhaps most importantly, establishing a means by which all categories of witness may have their testimony received. This thesis considers that, despite the need for appropriate variations in the treatment of evidence between different circumstances, many underlying challenges are the same. Receipt of evidence should fall within a procedural pallet, containing a range of options as a starting point and the one best suited to the particular proceedings selected at the outset. Most importantly, the starting point for all circumstances should not necessarily be orality.

The major original argument drawn through this thesis is to challenge the starting point that evidence should be received in the standard Anglo-American trial system in accordance with the principle of orality. It is argued that by accepting the pre-eminence of a continuing principle of orality, the needs of the administration of justice in the 21<sup>st</sup> century are hampered by its constraints.

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<sup>3</sup> Access to Justice, Lord Woolf, Master of the Rolls Final Report 1996, The Review of Civil Litigation in England and Wales R. Jackson, 2010 and Pigot, Judge T "Report of the Advisory Group on Video Evidence" (1989) HMSO

## **Approach to the Study: The Research Question**

**'To consider if a review of the place of the principle of orality may result in a more appropriate model for effective receipt of testimony, together with continuing evolution of the trial system in coming years.'**

The research question was formulated having considered existing areas of coverage and by developing a framework to investigate those questions against existing literature. The key objectives for consideration are:

1. Identification of the original purpose/remit of the principle of orality in modern litigation.
2. The possible consequences of and the extent to which modifications of that principle affect the administration of justice.
3. The basis for the legitimacy of modifications to the principle of orality in both civil and criminal proceedings.
4. The implications for the principle of orality as the most appropriate means for defining and safeguarding a fair trial in the context of particular categories of witness.

To address these objectives, the following aims were identified:

- To determine the original purpose/remit of the principle of orality.
- To establish the potential consequences of the modifications of that principle.
- To identify the approach of the English adversarial trial system and any change to the approach over time.
- To consider the legitimacy and effect of any change in the approach to the principle of orality.
- To identify the continued effectiveness of the principle of orality as the most appropriate means for defining and safeguarding a fair trial.
- To propose continuing review of a model for effective receipt of testimony, together with the ongoing evolution of the trial system in the coming years.

Developments in the attitude of the legal profession and associated agencies towards witnesses have been well documented and the subject of numerous studies and reforms<sup>4</sup>. The research methodology employed seeks to draw together information in relation to comment accessed through Ministry of Justice proposals and pilot schemes of alternative systems set up by the fair trial unit. Also considered are press releases and Parliamentary debates on the continued reforms governing the receipt of evidence. Critical comment from the media as well as commentary by interest groups has been considered throughout and is drawn together to form conclusions. Review of the existing literature throughout the thesis in books and articles identifies gaps in knowledge relating to the rationale for the principle of orality as a starting point for all types of proceedings whether civil or criminal in nature. Evaluation of the extent to which criticism has been justified and the formulation of relevant criteria for the development of an appropriate revised method for receipt of testimony is considered. Identification of key developments picked out in existing secondary sources (books and journals), and analysis of primary sources on key reforms is drawn through. This is to demonstrate that a procedural pallet ought to be considered as a more appropriate and effective means by which proceedings may be determined.

The conceptual framework onto which theories concerning the principle of orality would fit is formed by taking a systematic approach to those proceedings in both civil and criminal litigation falling within mainstream trial systems. To delimit the scope of the research, the place of the principle of orality within tribunals and other quasi-judicial proceedings does not fall within the boundary of the research question.

The structure of the chapters is such as to look at the general contextual background of the principle of orality, followed by consideration of its impact within civil litigation (Chapters 1 and 2). Consideration of the impact of the principle of orality on the expert witness, whose role it is to provide opinion evidence, rather than factual evidence,

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<sup>4</sup> See orality literature review at page 21

provides a link between civil and criminal litigation and is illuminating in providing insight on the particular issues arising within the Anglo-American trial system for this specialist category of witness. This bridge between fora is crucial in demonstrating the need for revision and review of the adversarial trial model and is sparsely dealt with in the literature. The overview of both civil and criminal systems is crucial in understanding the issue of structural change rather than piecemeal modification as a way forward. This bridge is as an underpinning justification in addressing the research question (Chapter 3). Having understood the general influence of the principle of orality, its effect on particular categories of vulnerable and intimidated witnesses cannot be understated. An enquiry into the development of special measures and the continuing research in this area underpins any answers found to address the research objectives (Chapter 4). Continuing attempts to tackle the issues arising from the need to receive evidence from particular categories of witness and strategies to accommodate those witnesses while maintaining fair trial procedures is considered to draw the theoretical framework towards a conclusion (Chapter 5). Analysis relating to the research questions together with proposals for continuing enquiry conclude the thesis (Chapter 6).

## **The System of Adversarial Trials and the Principle of Orality**

The principle of orality assumes that all witnesses are capable of speaking up for themselves and standing up to the testing nature of cross-examination. In this study, it is argued that the principle of orality acts as a constraint on the development of a system suitable for the broad range of proceedings undertaken within the trial system for the determination of both civil and criminal matters. This study addresses a perceived gap in knowledge relating to the place of the principle of orality within the system of litigation.

The courts in England and Wales depart from the principle of orality to such an extent that it is argued having it as a starting point does not always best serve the administration of justice in the 21<sup>st</sup> century. The reasons for departure from the use of direct oral testimony vary and range from expeditious case management to limiting costs and most importantly seeking to modify the principle of orality to enable the giving of evidence by vulnerable

and intimidated witnesses of fact. It is not contended that receipt of evidence from witnesses of fact through direct oral testimony in compliance with the principle of orality should be abandoned. Rather, this means of receipt of evidence should fall within a procedural pallet containing a range of options as a starting point and the one best suited to the particular proceedings selected at the outset.

The principle of orality has resulted in a torturous route to the most appropriate procedural mechanism by modification of the receipt of evidence by direct oral testimony rather than selecting the most appropriate mechanism as a starting point. To understand the pre-eminence of the principle that all witnesses, and in particular witnesses of fact, should give their evidence orally in open court Chapter 1 considers the basis for the adversarial trial system in England and Wales. It is contended that the deep roots, both historical and traditional, of the Anglo-American trial system need to be understood before the issues constraining the administration of justice can be addressed. The central premise of this research is that the adversarial trial process fails to achieve fairness and that a procedural pallet from which the most appropriate mechanism can be drawn would achieve a fairer system. This study calls for the development of procedures which do not take as their automatic starting point the principle of orality.

## **The Approach of the Civil Courts to Witnesses of Fact**

To understand the development of procedures for the receipt of testimony in civil proceedings, Chapter 2 will consider the modification of the principle of orality in order to achieve the objectives of the very significant reforms planned and implemented throughout the 1990s. How civil litigation in England and Wales is conducted changed fundamentally from 26 April 1999 on the bringing into force of the Civil Procedure Rules 1998 (CPR 1998) (SI 1998/3132). These rules embodied the reforms set out by Lord Woolf in his report *Access to Justice*<sup>5</sup> which was published in 1996 and provided a broad philosophy to tackle the perceived ills of the existing civil litigation system. It had long been

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<sup>5</sup> *Access to Justice*, Lord Woolf, Master of the Rolls Final Report 1996

considered that the system was too expensive, slow and inaccessible for many of those using it to resolve disputes. At the heart of reform was to seek to embed an overriding objective to deal with cases justly and at proportionate cost. The overriding objective of the reforms is set out in rule 1.1 of the CPR 1998:

### **The Overriding Objective**

- (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
- (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
  - (a) ensuring that the parties are on an equal footing;
  - (b) saving expense;
  - (c) dealing with the case in ways which are proportionate –
    - (i) to the amount of money involved;
    - (ii) to the importance of the case;
    - (iii) to the complexity of the issues; and
    - (iv) to the financial position of each party;
  - (d) ensuring that it is dealt with expeditiously and fairly;
  - (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
  - (f) enforcing compliance with rules, practice directions and orders.

The overriding objective has worked as a gloss on all aspects of civil procedure, including the implementation of the principle of orality. However, the principle of orality remains a starting point and justification is seen throughout the civil procedure rules for its modification. A central aspect of the civil procedure rules is the allocation of the case to a case management track. Several factors influence allocation to a specific track, but principally the value of the case is determinative. It appears easier to depart from the principle of orality in cases of lower value allocated either to the small claims track or the fast track than is the case in the management system reserved for high value cases, known as the multi-track. The different approaches taken are justified by reference back to the overriding objective set out in civil procedure rule 1.1. Chapter 2 reviews the treatment of

witnesses of fact and demonstrates that the strength of adherence to the principle of orality is dependent on the value of the claim.

Departure from the principle of orality is often based on considerations of value. But such is the embedded nature of the principle that witnesses of fact give oral evidence, via a hybrid method developed for medium value claims falling within the fast track. In this type of fast track trial the first part of testimony, examination-in-chief, is contained in a witness statement so that witnesses of fact may not normally add to this but, to remain in part compliant with the adversarial trial system and the giving of live oral testimony; cross-examination and re-examination is conducted in the traditional manner with questions being asked and live oral testimony received based on the written witness statement. Lord Woolf specifically acknowledged the pre-eminence of the principle of orality. The value placed on the adversarial trial system, to which the principle belongs, was evident through the consultation process leading to the final report.<sup>6</sup> It is argued that a procedural starting point not constrained by this principle would result in a more transparent and appropriate system of civil justice.

### **The Attitude Towards Receipt of Evidence from Experts**

The application of the principle of orality differs dependent on whether the witness in question is attending court to give a factual version of matters perceived, a witness of fact, or to provide an opinion on a matter of expertise outside the normal understanding of the court, an expert witness. Traditionally, the principle of orality whereby the witness attends court to provide oral testimony applies equally to witnesses of fact and expert witnesses. However, that principle has been modified significantly both in civil and criminal proceedings. This aspect of the trial process highlights a lack of structure in the approach

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<sup>6</sup> Access to Justice, Lord Woolf, Master of the Rolls Final Report 1996 at para 26

to trial modification. Similar issues are identified spanning both civil and criminal matters, yet modifications focus on issues particular to the matter in question.

In both civil and criminal matters, as is the case with witnesses of fact, the starting point with expert witnesses is the application of the principle of orality and the adherence to the traditional adversarial trial system. The reasons for departure and modification vary dependent on the value and complexity of the case and whether the hearings are of a civil or criminal matter. Notably, movement away from the principle of orality in criminal proceedings tends to follow reforms tested within the civil environment. This link is a means by which a more holistic view of appropriate processes could be developed. It is a limited indication that a bridging principle looking at suitability rather than a process of modification may be more effective. The civil procedure rules have been tested and updated since their introduction following on from the report of Lord Justice Woolf in 1998. While the starting point remains the giving of oral testimony, a movement towards an inquisitorial style, with the judge determining how the evidence is adduced, can be seen developing through civil proceedings and more recently developing through the criminal procedure rules.<sup>7</sup>

Chapter 3 of this thesis reviews the rationale for a hybrid system stemming from adherence to the principle of orality. The consultation process leading to Lord Woolf's final report fuelled the subsequent rules with only incremental movement away from the principle of orality when the nature of the proceedings required the traditional adversarial process to be modified. It will be argued that had the principle of orality been just one consideration within a procedural pallet then a more appropriate, and occasionally more inquisitorial, style for receipt of expert evidence could have been developed from the outset, without the necessity of an evolution arising from a difficult starting point.

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<sup>7</sup> The Criminal Procedure Rules 2013 No.1554

## **The Introduction of Special Measures in the Criminal Justice System for the Receipt of Oral Testimony**

Since the 1980s, there has been a growing recognition that the orthodox trial system must be reviewed and a system allowing for the giving of evidence by children and other vulnerable witnesses constructed within it. The giving of testimony by witnesses does little to encourage the giving of evidence by the most robust witness, let alone those witnesses who are children or otherwise vulnerable.

Lord Devlin's remark that 'the centrepiece of the adversary system is the oral trial',<sup>8</sup> is key when considering the impact of the principle of orality in driving and maintaining the three-stage process for the giving of evidence embedded within the system of criminal justice. It is the adversarial framework which sets out a formalised mechanism for this process comprising of evidence-in-chief; cross-examination and re-examination. Each stage of that process would normally take place in open court and be the subject of scrutiny by the jury in the Crown Court, or the Justices in the Magistrates' Court. Whether the essence of truth finding relies on this process is key. Does it follow that oral evidence ought to be in person and for the witness to be tested by cross-examination, which, by its very nature, is challenging? The perception that the process of questioning witnesses in open court is superior is one found in the Anglo-American common law orthodoxy. By the late 1980s, this view was questioned 'Alleged superiority of oral testimony is not universally accepted. Like historians, continental jurisdictions prefer documentary sources'.<sup>9</sup>

Another barrier to the provision of evidence by children and other vulnerable witnesses is the competence threshold and the requirement that sworn testimony is the norm. Again, this is a consequence of the principle of orality being a starting point so that evidence must be given both orally and on oath. On both counts, the Youth Justice and Criminal Evidence Act 1999 provides for a much improved approach. A new test of competence is set out<sup>10</sup>

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<sup>8</sup> Devlin, P, *The Judge*, OUP 1979 p.15

<sup>9</sup> McEwan, "J Documentary Hearsay Evidence-Refuge for the Vulnerable Witness?" (1989) Crim LR 629

<sup>10</sup> Youth Justice and Criminal Evidence Act 1999, section 53

together with provision to accept the unsworn evidence of children under 14<sup>11</sup> and to allow for the receiving of unsworn evidence from adult witnesses who pass the test for competence but who do not satisfy the requirement that they show a sufficient appreciation of the solemnity of the occasion and the particular responsibility, to tell the truth, which is involved in taking the oath.<sup>12</sup>

The impact of the giving of evidence for numerous witnesses, unfamiliar with the trial system, is both difficult and stressful.<sup>13</sup> The difficulties faced by vulnerable witnesses derive from the alien nature of the court, with the formality of the trial process placing an unacceptable burden. Children in particular face a difficult experience in telling their stories in a court setting with its unfamiliar terms and confusing questioning. The NSPCC conducted research into the experience of child witnesses and concluded “Despite a network of policies and procedures intended to facilitate children’s evidence, only a handful of young witnesses... gave evidence in anything approaching the optimum circumstances. Their experiences revealed a chasm - an implementation gap - between policy objectives and actual delivery around the country.”<sup>14</sup>

Equally, victims of sexual offences face a daunting examination of what would typically be private matters. The adversarial system is such that an attack on the credibility of these witnesses is commonplace. Questioning will frequently deal with matters of intense difficulty in suggesting the witness lacks credibility and seek to question the veracity of a witness making deeply distressing allegations.

There have been three areas identified as a cause for additional stress for witnesses who have learning disabilities.<sup>15</sup> Such witnesses often are not able to recall as readily as others and may struggle with recounting facts; secondly, these witnesses will frequently find communication hampered and finally, the process of cross-examination, with its testing

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<sup>11</sup> Youth Justice and Criminal Evidence Act, section 55

<sup>12</sup> Youth Justice and Criminal Evidence Act, section 56

<sup>13</sup> Ellison L, *The Adversarial Process and the Vulnerable Witness*, OUP 2001

<sup>14</sup> Plotnikoff J and Woodson, R ‘In Their Own Words: The experiences of 50 Young Witnesses in Criminal Proceedings’ 2004

<sup>15</sup> Sanders et al, ‘Working with Intimidated Witnesses’ (2006) Home Office Report

and challenging style, may well result in this category of witness giving answers which are perceived as desirable to please the questioner.

Witnesses who have been subjected to brutality and remain intimidated face hurdles in the giving of testimony in the orthodox style in open court and only the brave may attempt to meet such a challenge. The issues faced by children may have been the driver for change owing to the frequency and public nature of such criminal trials. However, in terms of brutality and intimidation, the 30-year conflict in Northern Ireland demonstrated the impact of the principle of orality when those willing to testify carried a huge risk of reprisal. Professor Monica McWilliams is a social scientist concerned with the consolidation of human rights following the conclusion of the negotiations between political parties and the British government in Belfast in 1998, resulting in the Belfast Good Friday agreement.<sup>16</sup> Professor McWilliams is concerned with the implementation of a Bill of Human Rights to ensure the embedding of the peace process<sup>17</sup> and in particular to address the issue of the departure of the UK from the European Union concerning human rights. The resurgence of violence in Northern Ireland remains of grave concern and Professor McWilliams commentary, during her participation in BBC Radio 4's Desert Island Discs,<sup>18</sup> demonstrates how the principle of orality finds its way into the political and social issues following acts of violence in Northern Ireland 'what was more important is witnesses, there's a huge frustration that people keep saying that the dogs in the street know who's doing this but you can't have the dogs in the street in courts, you actually need to have strong witnesses...You need special measures to protect those witnesses because organised gangs can come after you if they know you're going to stand up in court and give evidence...'<sup>19</sup>

The development of special measures started from the acknowledgement that the court experience was unacceptable for children. The variation of the principle of orality from the

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<sup>16</sup> Cm 3883 (1998) 37 ILM 751

<sup>17</sup> Smith A, McWilliams M, Yarnell P 'Does every cloud have a silver lining?: Brexit, repeal of the Human Rights Act and the Northern Ireland Bill of Rights' (2016) Fordham international law journal, 40 (1)

<sup>18</sup> First broadcast 9 June 2019

<sup>19</sup> <https://www.bbc.co.uk/sounds/play/m0005szy> accessed 10 June 2019

standpoint of the child gave rise to the broad acknowledgement that trials had to be different to accommodate a range of needs.

There followed the Pigot Report,<sup>20</sup> which made far reaching recommendations to address the issues in the giving of evidence by children and other vulnerable witnesses. Special measures were brought into the system through the Criminal Justice Act 1991. While the legislation now afforded the opportunity of pre-recorded evidence-in-chief, much of the Pigot Report remained to be addressed. At all points in the much needed process of reform, the starting point of principle of orality set within an adversarial process hampered the implementation of a system best suited to the administration of justice.

Part II of the Youth Justice and Criminal Evidence Act 1999 sought to address remaining issues. However, the YJCEA 1999 proved complicated in its structure, and a number of the special measures were to be brought in incrementally through a phased programme.<sup>21</sup> On 14<sup>th</sup> July 2013, over two decades after the Pigot Report sought to bring about reform by moving away from the principle of orality in cases of child abuse, the Director of Public Prosecutions, Keir Starmer QC, discussed further interim guidelines on prosecuting cases of child sexual abuse. In concluding his comments, the Director of Public Prosecutions states:

But most of all, and most importantly, the consultation is now open to the public for their views. What I want to avoid is finding out in five or ten years that there are shortcomings and weaknesses in the guidelines that could have been identified now, so please let me have your views.<sup>22</sup>

It is evident from these comments that a solution to the traditional adversarial trial system in such cases remains a problematic subject fraught with difficulty and the subject of

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<sup>20</sup> Pigot, Judge T Report of the Advisory Group on Video Evidence HMSO 1989

<sup>21</sup> See appendix 1 from the Home Office Online Report 01/06

<sup>22</sup> [http://www.cps.gov.uk/news/articles/interim\\_csa\\_guidelines/](http://www.cps.gov.uk/news/articles/interim_csa_guidelines/) accessed 2 July 2014

continuing debate. In 2016 Keir Starmer's successor as DPP, Alison Saunders, continued the conversation:

It is without doubt that special measures significantly improve the experience of children victims and witnesses at court, and it is our duty to ensure that we continue to make special measures applications whenever required. So how do we do that?... Since I have been DPP, I have heard some truly excellent examples of this in practice - where, for example, children have been interviewed in makeshift dens and tents in 'child friendly' interview suites by police and intermediaries, with sandpits and toys in the room. The aim is to make them feel as comfortable as possible so they are able to give their best evidence.<sup>23</sup>

Chapter 4 of this thesis analyses this most compelling area for reform of the principle of orality and argues that only by a change in mindset towards the nature of criminal proceedings in which children, vulnerable, or otherwise intimidated witnesses are involved can a system fit for the 21<sup>st</sup>-century be developed.

## **The Future of the Principle of Orality and Conclusions**

Chapters 5 and 6 of the thesis consider the future of the principle of orality and seek to draw conclusions for its future development. It is necessary to draw the thread of the argument, that a different starting point should be considered, rather than continuing with modifications and hybrids developing out of the traditional adversarial system, through the range of procedural issues identified in the thesis.

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<sup>23</sup> <https://www.cps.gov.uk/cps/news/children-and-young-people-witnesses-alison-saunders-dpp> accessed 11 June 2019

## Methodology

In conjunction with the supervisory team, a doctrinal methodology was considered the most appropriate for the thesis. The doctrinal approach encompasses a qualitative and theoretical approach underpinned by black letter law. This methodology typifies the approach to research by lawyers<sup>24</sup> and is a core transferable skill for legal professionals. This thesis considers the impact of the traditional adversarial framework in a modern day practical context.

The research methodology employed seeks to draw together information in relation to comment accessed through Ministry of Justice proposals and pilot schemes of alternative systems set up by the fair trial unit. Also considered are press releases and Parliamentary debates on the continued reforms governing the receipt of evidence. Critical comment from the media and commentary by interest groups has been considered throughout and is drawn together to form conclusions. The integration of the black letter approach is recognised as a valid means of drawing together the key sources and ensuring a critical evaluation throughout the thesis.<sup>25</sup> A theoretical critique sits alongside with analysis of the law and procedure, gaps are identified and proposals for a structured reform examined. The methodology results in a process of identifying and analysing the issues, reviewing the integrated literature and drawing conclusions towards answering the research question.

Review of the existing literature throughout the thesis, in books and articles, identifies gaps in knowledge relating to the rationale for the principle of orality as a starting point for all types of proceedings whether civil or criminal in nature. The integration of the literature review allows for a structured approach with links demonstrated and considered systematically. An integrated literature review was the most effective means of placing the research in the context of the existing literature and secondary sources and worked to the best effect given the nature of the subject matter. These gaps enable a

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<sup>24</sup> D, Pearce, E. Campbell and D. Harding, Australian Law Schools A Discipline Assessment for the Commonwealth Tertiary education Commission, Canberra Australian Government Publishing Service 1987

<sup>25</sup> Salter. M & Mason. M, Pearson 2007 p. 182

critical commentary and facilitate an original contribution through the development of the thesis within the framework set out above.

Through the process of write up the gaps in the current system are identified and links between these issues are established driving towards the conclusions set out in Chapter 6. The integrated literature review demonstrates the literature in each distinct category and also demonstrates the absence of content taking a holistic approach across fora. A research question on the way forward for both civil and criminal matters, therefore, makes an original contribution to this aspect of research in the field of practical litigation.

Overall an integrated literature review is most suitable. However, in order to demonstrate that the contribution lies in the field of practice and professional discourse rather than falling within the academic domain a review on the literature on the topic of orality is appropriate.

Books in the academic domain by authors such as Bentham,<sup>26</sup> Cairns,<sup>27</sup> Devlin,<sup>28</sup> Donlan,<sup>29</sup> Franks,<sup>30</sup> Rock<sup>31</sup> and Wigmore<sup>32</sup> consider the historical and developing perspective and encompass the academic debates which contextualise the origins of the modern litigation landscape but do not address the continuing modernisation of the field of professional litigation process.

Authors of books falling within the continuing review of the manner in which orality matters to the way forward in the professional field relating to process can be seen in the work of Ellison<sup>33</sup> who identified the issues relating to the manner in which evidence was adduced in the context of sexual offence matters and more broadly in relation to the

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<sup>26</sup> Bentham Jeremy, *The Works of Jeremy Bentham*, vol. 7 (*Rationale of Judicial Evidence Part 2*), 1843

<sup>27</sup> Cairns, D *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* OUP, 1999

<sup>28</sup> Devlin P, *Trial by Jury*, The Hamlyn lectures 8<sup>th</sup> series, 1956; Devlin P, *The Judge*, OUP, 1979  
Devlin P and *Easing the Passing*, Faber and Faber, 1985

<sup>29</sup> Donlan S.P, *The Dearest Birth Right of the People of England: The Jury in the History of the Common Law*, Hart Publishing, Oxford, 2002

<sup>30</sup> Frank J, *Courts on Trial*, Princeton, 1949

<sup>31</sup> Rock P, *The Social World of an English Crown Court*, 1993

<sup>32</sup> Wigmore, J.H, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* 3<sup>rd</sup> edn. (1940), Boston: Little, Brown) vol.5.

<sup>33</sup> Ellison L, *The Adversarial Process and the Vulnerable Witness*, OUP, 2001

impact of the continuing system in terms of vulnerable witnesses. The contribution as to the effect of a failure to develop best practice sits in this context around treatment of vulnerable or intimidated witnesses.

Similarly the contribution in relation to the discourse around direct analysis of orality in the process of receiving testimony is placed with those issues addressed by McEwan,<sup>34</sup> Spencer and Lamb.<sup>35</sup>

Richard Susskind in his recent review of the proposed development of online courts<sup>36</sup> brings the modern litigation field to the fore in considering the idea of process rather than place in terms of dispute resolution and the contribution relating to process and its suitability for current litigation falls in this practice area.

Articles demonstrate the practical context for the contribution. Birch has written extensively on the issues arising from slow change in the practice of receiving testimony.<sup>37</sup> Casmore, Bussey, Davies, Kenan, Maitland Morgan, Hoyano, Cooper and Roberts deal with those issues around a failure to develop best practice through adherence to the principle of orality.<sup>38</sup> Similarly Hamlyn, Phelps, Turtle, Satter, Henderson and Lamb identify matters associated with case progression linked to orality.<sup>39</sup>

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<sup>34</sup> McEwan J, *Evidence and the Adversarial Process*, 2<sup>nd</sup> ed., Oxford, 1998

<sup>35</sup> Spencer, 'Evidence and Cross-Examination' in La Rooy, Malloy, Katz and Lamb (eds), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice*, 2011

Spencer and Lamb, *Children and cross-examination: Time to change the rules*, 2012

<sup>36</sup> R, *Online courts and the Future of Justice*, OUP, 2019

<sup>37</sup> Birch D, 'A better deal for vulnerable witnesses' [2000] LR 223 and Birch D, and Powell R, 'Meeting the Challenges of Pigot: Pre-trial Cross Examination under s.28 of the Youth Justice and Criminal Evidence Act 1999'

<sup>38</sup> Davis G, Hoyano L, Keenan C, Maitland L, Morgan R, "Research findings" (1999) Home Office, Cooper D, and Roberts P, 'Special Measures for Vulnerable and Intimidated Witnesses: an Analysis of Crown Prosecution Service Monitoring Data' (June 2005) CPS, London, Cooper D, 'Pigot Unfulfilled: Video recorded cross-examination under section 28 of the Youth Justice and Criminal Evidence Act 1999' (2005) Crim LR 456, Hoyano L, 'Variations on a theme by Pigot: special measures directions for child witnesses' (2000) Crim LR 250 Hoyano L, 'The Child Witness Review: much ado about too little' (2007) Crim LR, Hoyano L, 'Variations of a theme by Pigot: Special measures Directions for Child Witnesses' (2000) Crim LR at pp 268-271, Hoyano L, 'Coroners and Justice Act 2009: special measures directions take two: entrenching unequal access to Justice?' (2010) Crim. L.R. 345 and

Hoyano L, 'Reforming the adversarial trial for vulnerable witnesses and defendants' Crim. L.R.2015, 2, 107-129

<sup>39</sup> Hamlyn B, Phelps A, Turtle J, and Satter, 'Are Special measures Working? Evidence for surveys of vulnerable and intimidated witnesses' (2004) *Home Office Research Study*, No 283 Henderson H and Lamb M, 'Pre-recording children's trial testimony: effects on case progression' (2017) *Crim. L.R.* 345

Ellison continues to refine those issues linked to orality and communication in the modern practice of receipt of testimony.<sup>40</sup> Morrison , Forester-Jones , Bradshaw , Murphy and Myers, continue the review of orality as a means of communication for testimony.<sup>41</sup>

Considering the issues in relation to expert evidence the contribution falls within process considered by Downes, Edmond, Roberts and Genn.<sup>42</sup>

A focus on the plight of the vulnerable around orality is considered by Plotnikoff, Woolfson, Spencer, Stevenson, Sood and Tempkin<sup>43</sup> and the contribution ties with this area of developing practice and process.

Whilst the official documents referred to in the integrated review have a link with the impact of adversarialism those key to the modern litigation landscape demonstrating the contribution falls within the conversation surrounding practice and procedure can be seen in Lords Woolf and Jackson reports<sup>44</sup> in terms of civil matters. The development of an on-line court links closely with the contribution of this thesis in highlighting the constraints

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<sup>40</sup> Ellison L, Munro VE, 'Taking trauma seriously: Critical reflections on the criminal justice process' (July 2017) *IJEP* 21 3 (183)

Ellison L, 'Cross-examination and the Intermediary: Bridging the language divide?' (2002) *Crim LR* 114

<sup>41</sup> Morrison J, Forester-Jones R, Bradshaw J, Murphy G, 'Communication and cross-examination in court for children and adults with intellectual disabilities: A systematic review' (October 2019) *IJEP* 23 4 (366)

Myers J, 'Paint the child into your corner', 10 *Family Advocate* 42, 43

<sup>42</sup> Downes G, 'Concurrent expert evidence in the administrative appeals Tribunal: the New South Wales experience' (February 2005) Paper presented at the Australian conference of planning and environmental courts and tribunals Hobart Australia

Edmond and Roberts, 'The Law Commission's Report on Expert Evidence in Criminal Proceedings' (2011) *Crim LR* 844, Genn H, 'Getting to the truth: experts and judges in the 'hot tub'' (2013) *Civil Justice Quarterly* Vol 2 issue 2

<sup>43</sup> Plotnikoff J, and Woolfson R, 2004 'In their own words: the experiences of 50 young witnesses in criminal proceedings', *Policy practice research series*, London NSPCC, and 'Evaluation of young witness support' (2007) Ministry of Justice 'Evaluation of young witness support' (2007) Ministry of Justice

Plotnikoff J, Woolfson R, 'Measuring Up? Evaluating the implementation of Government commitments to young witnesses in criminal proceedings' (2009) *NSPCC*, 2009

Plotnikoff and Woolfson, 'Cross-examining children - testing not trickery' (2010) *Archbold Review*

Spencer J.R, 'Children's evidence: The Barker case and the case for Pigot' (2010) *Archbold Review*

Stevenson K, Sood U, 'Pigot: the need for a good look at videos' (1990) *Law Society Gazette*

Tempkin J, 'Doing Justice to Children' (1991) 141 *NLJ* 315

<sup>44</sup> Access to Justice, Lord Woolf, Master of the Rolls Final Report 1996, The Review of Civil Litigation in England and Wales R. Jackson 2010

around orality.<sup>45</sup> In the criminal domain the conversation started by the Pigot report<sup>46</sup> links with the contribution on the issues arising from the constraints of orality in criminal trials.

In developing this thesis the tutor advice from the outset was to draw upon the preceding LLM. Inclusion of narrative and descriptive background is with permission and acknowledged.

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<sup>45</sup> Civil Courts Structure Review: Final Report Lord Justice Briggs July 2016

<sup>46</sup> Pigot, Judge T 'Report of the Advisory Group on Video Evidence' (1989) HMSO

# CHAPTER 1 - THE RECEIPT OF ORAL TESTIMONY

## 1.1 Introduction

A crucial element in the story of the development of attitudes towards the English adversarial trial system is the traditional view that witnesses lack credibility unless they have satisfactorily performed in a live oral rendition of their perception of the events at issue in the case:

In an English criminal trial oral evidence is the rule and written evidence the exception. Oral evidence comes from the witnesses who are called by each side, so that a witness is either for the prosecution or for the defence. The judge has an inherent power to call the witness but it is virtually never exercised. All oral evidence is given by means of interrogation in public: the witness may sometimes be encouraged to 'tell my lord and the jury in your own words' but any attempt at a speech is at once curbed.<sup>47</sup>

The perception that oral testimony is to be preferred is considered throughout and in particular in Chapters 4 and 5, when the necessity of modification in criminal trials is interrogated. The question is whether the whole idea of receiving and placing reliance on the testimony of a witness through the medium of the traditional Anglo-American trial system is misconceived. While numerous modifications of the system are a vital and invaluable step towards achieving a more appropriate forum for the receipt of evidence, firmly embedded perceptions of the need to 'test' witness evidence by this means are a cause for debate in achieving progress towards better trial outcomes. This chapter demonstrates how the principle of orality gained its pre-eminence in the Anglo-American trial system and supports the theory that, rather than being developed as the best tool by which the truth can be sought, simply evolved and became the accepted *modus operandi*. The premise of this chapter is to open the debate that, rather than being the best model

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<sup>47</sup> Devlin P, *Easing the Passing*, Faber and Faber, 1985 102

for all circumstances, the principle of orality became embedded both systematically and psychologically as the means by which we 'test' the evidence in the adversarial trial system.

The tensions between a traditional adversarial system of justice and a more inquisitorial system have resulted in a blending of approaches and the extent to which this has produced a properly constructed system of justice is analysed. The issues arising from the law of evidence add to the blending of the adversarial and inquisitorial and the continued modification of the principle of orality is considered. The matters raised at the outset of this thesis set the framework for discussion of a more radical departure from the principle of orality as the starting point from which a system of justice should continue to be constructed rather than to evolve. The framework of the thesis develops the argument and addresses the research questions by considering the following:

1. What is the principle of orality, and how did it develop from a historical context?
2. What is the effect of the principle of orality in the perception of the English adversarial trial system?
3. Why is its pre-eminence as a starting point for the receipt of evidence so readily acknowledged?
4. The litigious landscape is divided into the civil and criminal forums with very different procedural and evidential rules. However, has the principle of orality had an impact on reform in both?
5. Has the drive towards costs limitations clouded a real analysis of the appropriateness of using hybrid methods derived from the principle of orality as opposed to more appropriate modern means of enquiry?
6. Given the link between civil and criminal procedural reform, what impact has an adherence to the principle of orality had on achieving reform for the most vulnerable and intimidated witnesses?

## 1.2 The Principle of Orality in the English Trial

The principle of orality has been pivotal in shaping the rules of trial procedure as they developed from common law rules to more formalised procedural rules now set out both in the civil and criminal procedure rules.<sup>48</sup> It is important to underline that those rules have reached their current format through development in the context of an adversarial trial system. Historically the giving of direct testimony orally developed through, and lay at the foundation of, the common law trial. This means that as a norm witnesses of fact (as distinct from those witnesses, such as experts, providing the court with an opinion) should personally attend to speak rather than have their evidence received in written format. The assumption that this technique offers a credible means of fact-finding is to a large extent accepted owing to its historical roots with a large and complex body of rules developed to bolster both credibility and reliability within this trial system:

After the Norman conquest, Henry II regularised these nascent proceedings to establish greater control over the administration of justice, first in civil trials and then in criminal trials. Similarly, the "petit" jury was first essentially a body of witnesses, called for their knowledge of local customs or of the parties or facts in dispute.<sup>49</sup>

A witness of fact is called to give an account of those matters in respect of which the witness claims direct personal knowledge (often referred to as an eye witness). Reliance in testing the eye witness is placed on the opportunity to observe the demeanour of the witness and the assuredness with which answers are given to determine the extent to which the testimony carries weight in the fact-finding process. The persuasive quality of the evidence is thought to be demonstrated by that witness 'speaking up'. The unreliability inherent in a fact-finding exercise based on the opportunity to observe the demeanour of

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<sup>48</sup> The Civil Procedure Rules 1998 No. 3132 and  
The Criminal Procedure Rules 2013 No. 1554

<sup>49</sup> Sean Patrick Donlan, *The Dearest Birth Right of the People of England: The Jury in the History of the Common Law* Hart Publishing, Oxford, 2002 277

a witness, rather than to evaluate evidence in a documentary form, is acknowledged by academics and judiciary alike:

A witness who gives evidence orally demonstrates, for good or ill, more about his or her credibility than a witness whose evidence is given in documentary form. Oral evidence is public; written evidence may not be. Oral evidence gives to the trial the atmosphere which, though intangible, is often critical to the jury's estimate of the witnesses. By generally restricting the jury to consideration of testimonial evidence of its oral form, it is thought that the jury's discussion of the case in the jury room will be more open, the exchange of views among jurors will more easily occur than if the evidence were given in writing or the jurors were each armed with a written transcript of the evidence.<sup>50</sup>

As to the fact finders, they are most likely to use inferential reasoning to supplement the evidence in the case and fill the gaps in it, which may involve the creation of non-existent facts. Finally, there are the witnesses who, if not telling the truth, will either be lying or mistaken. As to the mistakes, there is obviously scope for error, not only in their observation of events, but also in their memory of it and in their recounting of those events in court. There is also the risk that witnesses may give truthful but unreliable evidence of facts which may have been created by parties involved in the legal process, a classic example being evidence of false confession produced during the interrogation of the suspect.<sup>51</sup>

Clearly, a great deal of credence is placed on the principle of orality as the 'centrepiece of the adversarial system'.<sup>52</sup> Much emphasis is placed on the value of hearing what a witness has to say based on that witness's own perception of events. To evaluate what a witness has to say based on the witness's direct knowledge of events is seen as intrinsically superior to comparable evidence produced and evaluated in a documentary form such as

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<sup>50</sup> *Butera v DPP* [1987] 164 C.L.R. 180 at 189

<sup>51</sup> Keane A, *The Modern Law of Evidence*, 11<sup>th</sup> ed., OUP, 2016

<sup>52</sup> Devlin, P *The Judge*, OUP 1979 54

a formal witness statement or affidavit. However, witness statements have now replaced direct oral testimony in many situations, this the result of questions being posed as to the suitability and necessity of live oral testimony. Perhaps a better approach would be to start afresh. Rather than always taking procedure from a modification of the principle that all evidence should be delivered from live oral testimony and instead taking a fresh approach to achieving the best method of enquiry into those facts remaining in issue at the start of the trial. A reconsideration of the procedure for the receipt of live oral testimony first arose in a fundamental re-evaluation of the litigation process in civil procedure by Lord Woolf and became known as the 'Woolf Reforms'.<sup>53</sup> The impact of those reforms on the continuing evolution of the principle of orality will be considered further in Chapter 2.

Despite the reforms, the principle of orality remains the starting point from which all other methods for the receipt of evidence are derived. This thesis will evaluate the rationale for this bedrock of the adversarial trial system and seek to formulate a rationale for its continuance together with suggesting how its reform may be addressed. Any debate should acknowledge the undoubted values of such a long established and tested systematic approach provided by a system in which most issues at a trial are decided based on what a witness has to say. This means of determining the truth is long established but ought to continue based on its value in bringing about the best result rather than it merely being the accepted norm.

The premise of the traditional Anglo-American adversarial trial is that the testing of direct testimony from an eye witness should be conducted under prescribed conditions. While forums vary in style dependent on the nature of the proceedings, trials share a level of austerity and formality designed to place the witness in circumstances in which the heightened obligation to speak the truth is very much apparent. This is a process of testing the strength of the evidence, which is seen as of greater value in ascertaining the truth than to evaluate the same evidence contained in documentary format. This idea of a dread

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<sup>53</sup> Access to Justice Lord Woolf, Master of the Rolls Final Report 1996

of manufactured evidence is acknowledged in the evolution of testing the witness in a live forum:

The common law lived in constant fear of the perjury, fabrication and attempts to abuse or pervert the course of justice.<sup>54</sup>

As part of this process each side will adduce its evidence. Each witness undergoes a highly regulated form of questioning following the sequence examination-in-chief; cross-examination and re-examination. Through examination-in-chief the party who called a witness seeks to draw from that witness evidence to support that party's case. In criminal cases, while the witness will have prepared an earlier statement, the examiner may question beyond its scope. While in civil cases, dependent on the appropriate case management for the particular cause of action, the witness normally refers to an earlier witness statement, following which the witness is tended for the opposing party to conduct cross-examination.

This is the stage of testing of the evidence during which the principle of orality is most apparent. The opposing party asks testing questions to probe the accuracy and veracity of the witness's answers during examination-in-chief. The cross-examiner also attempts to obtain facts relevant and favourable to the cross-examining party. The premise of this system is that by subjecting the witness to a process of scrutiny, through examination-in-chief and cross-examination, the court is more likely to receive an accurate version of events than by other means of enquiry. It is this concept more than any other which causes us to consider our trial system to be adversarial in nature. That is not to suggest a lack of acknowledgement of its flaws or unquestioning acceptance of this model as the most appropriate in all circumstances. There are numerous variants of the system but the common elements, most notably the principle of orality and associated techniques of questioning, result in a system of truth and fact-finding largely set within its confines. It is

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<sup>54</sup> Glover R and Murphy P, *Murphy on Evidence* 15<sup>th</sup> ed, OUP 2017 10

seen as the 'centrepiece'<sup>55</sup> and a system of interrogation is acknowledged as important in constructing a version of events:

interrogation is used not only to unlock factual information that the suspect already has, but also in a creative way to bring facts into existence in the form of admissions produced and structured by the form and manner of questioning.<sup>56</sup>

Even though the principle of orality prevails in both civil and criminal trials it is undoubtedly considered of great importance that members of the jury are given the opportunity to evaluate the witnesses' certainty and robustness while providing a live oral account under oath. This inevitably results in the possibility that collateral matters will come to bear on the process of evaluation. Collateral matters, often referred to as side issues, are those considerations likely to have a considerable influence on the mind of the average juror. Collateral issues are not the live issues lying at the heart of the case but important in that they affect the credibility of the witness:

If the answer of a witness is a matter which you would be allowed on your own part to prove in evidence. If it has such connection with the issues, that you would be allowed to give it in evidence, then it is a matter on which you may contradict him.<sup>57</sup>

Such collateral issues include witness bias,<sup>58</sup> bad character<sup>59</sup> (normally the existence of a previous conviction relevant to the matter in hand) and physical or mental disability affecting the ability of the witness to give reliable evidence:

Human evidence ... is subject to many crosscurrents such as partiality, prejudice self-interest and above all imagination and accuracy. These are matters in which the jury, helped by cross examination and common sense, must do their best. But when a

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<sup>55</sup> Devlin P, *The Judge*, OUP 1979 54

<sup>56</sup> Dennis I, *The Law of Evidence*, 6<sup>th</sup> ed., Sweet & Maxwell, 2014 557

<sup>57</sup> *Att Gen v. Hitchcock* [1847] 1 Exch 91 99

<sup>58</sup> *R v Mendy* [1976] 64 Cr App R 4.

<sup>59</sup> Criminal Procedure Act 1865 s6

witness through physical (which I include mental) disease or abnormality is not capable of giving a true or reliable account for the jury, it must surely be allowable for medical science to reveal this vital hidden factor to them.<sup>60</sup>

It follows from this that the principle of orality is not only considered pivotal as a means of addressing the issues at hand in a trial but also in evaluating the reliability of the witness by means of scrutiny in the presence of the jury. Given jury trials occur in very few civil matters this consideration is primarily confined to those matters being tried in a Crown Court before a judge and jury. Lord Devlin was erudite on this aspect of the principle of orality and its importance in jury trials. The views expressed by Lord Devlin helped to shape attitudes towards the system of adversarial trials. Previously accepted and entrenched approaches towards a system of fact finding were opened to debate and the possibility of more significant reform:

Devlin was a man of the utmost compassion. His much quoted remark 'Trial by jury is the lamp that shows that freedom lives', given in the 1956 Hamlyn Lectures, could easily be amended with the substitution of 'Devlin' for the word 'jury'.<sup>61</sup>

However, on considering the historical justification for the principle of orality as the starting point in all trials, not just criminal matters presided over by judge and jury, it is right to question its appropriateness in a modern trial system. Lord Devlin acknowledges the emergence of the principle of orality from a historical context:

If today twelve men and women were put into a committee room and told they must listen to the evidence and find the facts, they would call for pen and paper, make careful notes and some at least of them would want to take a vigorous part in questioning the witnesses; they would ask for copies of the depositions and all of the documents produced in the case. But trial by jury did not grow up in that atmosphere. The parts to be played in it by judge and jury were being worked out when

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<sup>60</sup> *Toohey v the Metropolitan police Commissioner* [1965] AC 595

<sup>61</sup> Obituary: Lord Devlin JAMES MORTON, *The Independent*, Tuesday 11 August 1992

documentary evidence was slight, duplication of documents laborious and a juror's powers of reading and writing very limited. In 1790 in a case where there was a question of disputed handwriting, the judge refused to admit evidence the comparison of hand; for if he did, he said, the situation of a jury which could neither read nor write would be impossible.<sup>62</sup>

So it is that the jury evolved into its modern incarnation, rather than having been constructed to suit the circumstances and venues of a modern age. A feature of the adversarial trial is that the jury is left incommunicado to evaluate all the evidence that has been presented together with the judicial directions given on matters of law. The principle of orality plays a very powerful role in jury deliberations and is most important in criminal trials. This is demonstrated by comparison against a significant relaxation of the role of the witness giving live oral testimony in the modification found in the civil procedure rules, which will be considered further in Chapter 2. While magistrates differ from juries in terms of composition and regulatory control, the fundamental idea that lay members of magistrates' benches require an evaluation of live oral testimony from a witness giving a first-hand account of matters they have perceived prevails. This thesis also analyses and evaluates the use of live oral testimony in civil proceedings from which the evolution of the principle of orality can be seen to have taken a very different course.<sup>63</sup> Common to both criminal and civil cases is that the principle of orality is the starting point for all adversarial proceedings. All reforms and modifications can be traced back to the principle of orality.

The role of the jury in the Crown Court sheds a great deal of light on an understanding of the importance of direct oral testimony within the adversarial trial system. The development of the English jury spanned centuries. Their origins can be traced to Norman times. While the modern jury plainly differs in terms of its composition and role from that of the historical jury, it is enlightening to appreciate that the legislature or formal committee did not create the jury. Rather, it evolved, thereby leading to societal

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<sup>62</sup> Devlin P, *Trial by Jury* The Hamlyn lectures 8<sup>th</sup> series 1956 at p.5

<sup>63</sup> See Chapter 2

acceptance of its value.<sup>64</sup> The importance of the role of the jury in assessing the value to give to any evidence, primarily based on the testing of that evidence, by placing the witness at the centre of the trial to be questioned can be summed up as follows:

Whether a rope will bear a certain weight and take a certain strain is a question that practical men often have to determine by using their judgement based on their experience. But they base their judgement on the assumption the rope is what it seems to the eye to be and has no concealed defects. It is the business of the manufacturer of the rope to test it, strand by strand if necessary, before he sends it out to see that it has no flaw; that is a job for an expert. It is the business of the judge as the expert who has a mind trained to make examinations of the sort to test the chain of evidence for the weak links before he sends it out the jury; in other words, it is for him to ascertain whether it has any reliable strength at all and then for the jury to determine how strong it is.<sup>65</sup>

So it is that the role of the jury has grown into its modern form from its historical context. However, the jury was created for a very different purpose in allowing the king in Norman times to take an oath to serve the crown and so it is from this starting point that the taker of the oath could be relied upon as a person of veracity. This then developed into something more akin to the modern jury:

It was King Henry II who was directly responsible for turning the jury into an instrument for doing justice and Pope Innocent III who was indirectly responsible for its development as a peculiarly English institution. Henry II understood well the importance of extending the royal jurisdiction as a means of enlarging the royal power; and also the royal purse, for the conduct of litigation was in those days a profitable business.<sup>66</sup>

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<sup>64</sup> Rock P, *The Social World of an English Crown Court*, 1993

<sup>65</sup> Devlin P, *Trial by Jury* The Hamlyn lectures 8<sup>th</sup> series 1956 64

<sup>66</sup> Devlin P, *Trial by Jury* The Hamlyn lectures 8<sup>th</sup> series 1956 7

The place of the principle of orality within the English criminal trial system appears assured. The question is whether it may, in certain categories of proceedings, be preferable to start with a clean slate allowing for a different procedure, rather than continue to modify the principle of orality. Its historical tradition and acceptance as the pre-eminent means of ascertaining the truth, insofar as that is possible to determine by any means, is unlikely to face radical reform. However, to achieve a fair trial significant modifications have been introduced. In civil matters, while the principle of orality has not been abandoned, it has been modified to a great extent.

### **1.3 Adversarial v Inquisitorial**

There are numerous different trial systems throughout the world and society seeks from these various methods to draw the most accurate version of the truth from which to reach a decision. In Western society two strands have grown up, the adversarial system (traditional Anglo-American trial system) and the inquisitorial system. The latter seeks to enquire into the truth and places less reliance on the principle of orality.<sup>67</sup> The word adversarial denotes adversary and links to the idea of a fight between opposing contestants rather than what may be considered a more civilised enquiry. It is far from clear that the adversarial system, as opposed to the inquisitorial system, provides a model most appropriate for fact finding. Continental Europe favours the inquisitorial model and certainly some of its structures and processes have found their way into the modified adversarial trial system in England. This is most notable in civil procedure but has also resulted in significant modification of the criminal trial process. The adversarial trial system is an Anglo-American model and assumes a 'contest' between opposing parties. In both civil and criminal litigation, there has been a move towards a 'cards on the table' approach to the litigation process. Modern procedures drive towards an open and fair system of advance disclosure and as such there should no longer be 'trial by ambush'. The question to consider is how far modern reforms have moved our system towards an inquisitorial

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<sup>67</sup> Field S, Fair Trials and Procedural Tradition Oxford Journal of Legal Studies 2009 29(2) 365

system and whether further reform is necessary. In civil proceedings this has been drawn from the findings of Lord Woolf<sup>68</sup> and in criminal proceedings perhaps most importantly from the seminal report of Judge T. Pigot.<sup>69</sup> The Pigot report considered the importance of reviewing the principle of orality in criminal proceedings to allow for a fairer system for the receipt of evidence from certain categories of witness. This compelling driver for change in criminal proceedings will be considered further in Chapter 4.

To evaluate the adversarial trial system it is important to understand its structure. The first task of the prosecution in a criminal trial is to adduce sufficient evidence to persuade the judge that there is a case to answer. The prosecution will call their witnesses for examination-in-chief. As for all parties in litigation, the prosecution as the party calling a witness is not permitted to ask leading questions. Cross-examination will follow the witness's evidence-in-chief. The cross-examiner will carefully pick through the testimony which the witness has given in evidence-in-chief, since it is assumed that a party who fails to dispute a fact in cross-examination has accepted the facts relayed by the witness under examination-in-chief. In contrast to the party calling the witness, the cross-examiner may use leading questions in an apparent attempt to persuade the witness that he or she is either lying or is mistaken. To discredit the testimony, the cross-examiner may also attack the character of the witness. Following cross-examination the prosecutor will have an opportunity to re-examine the witness. Re-examination will be used to emphasise the evidence given and to restore the credibility of the witness if damaged in cross-examination. Once the prosecution has presented sufficient evidence to persuade the trial judge that there is a case to answer, the prosecution case is closed and it is not normally permissible for the prosecutor to introduce any further evidence. At the end of the prosecution case the defence may submit that there is 'no case to answer' if there appears to be insufficient evidence to persuade a reasonable jury of the defendant's guilt.<sup>70</sup>

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<sup>68</sup> Access to Justice, Lord Woolf, Master of the Rolls Final Report 1996

<sup>69</sup> Pigot, Judge T Report of the Advisory Group on Video Evidence HMSO 1989

<sup>70</sup> *R.v Galbraith* [1981] 1 WLR 1039

In determining whether the prosecution has satisfactorily met the requirements for a case to answer, the following matters will be considered:

1. There has been evidence to prove the essential elements of the alleged offence,  
and
2. The prosecution evidence, taken at its highest, is such that a conviction could properly be based upon it.<sup>71</sup>

A similar pattern is adopted in civil trials, with the party bringing the case presenting its evidence during the first phase of the trial. The modifications of the civil trial process by comparison with the criminal process will be considered in more depth in Chapter 2.

The defence may then present its evidence (this applies equally in civil matters). The defendant in a criminal trial must at this stage decide whether to testify in person. Section 35 of the Criminal Justice and Public Order Act 1994 provides that inferences may be drawn from the failure of the accused to give evidence or if he, without good cause, refuses to answer questions.

However, it should be underlined that it is also possible that defence evidence may serve to strengthen the prosecution case (or the claimant's case in a civil matter). Where a defendant, or indeed any witness, presents testimony it is evidence for all purposes, and not just to support the case of the examiner. For example, a defence witness may admit under cross-examination that he fabricated evidence to assist the defence, or any defence witness may make damaging admissions while being cross-examined. These characteristics point towards an acknowledgement that the English trial system is adversarial in nature. Where an inquisitorial style is in play, rather than establishing a particular issue from the point of view of one or the other 'adversaries', a more neutral enquiry is undertaken.<sup>72</sup>

An essential feature of the English trial system is judicial control. The judge, within a regulated structure, controls matters of admissibility and decides which witnesses may

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<sup>71</sup> *Practice Direction (Submission of No Case)* [1962] 1 WLR 227

<sup>72</sup> Douk J and McGourlay C, *Evidence in Context*, 4<sup>th</sup> edition, Routledge 2015 36

testify and how they may testify. The evidence, including any confession by the accused, may be excluded because of some improprieties in how it was obtained, as with all issues of admissibility that is a matter of law for the judge to determine.

Before the jury determines the issues, the trial judge must sum up the case. The judge must direct the jury on the relevant substantive law and remind jurors of the evidence that has been given and explain several evidential matters. A typical direction will begin with an explanation as to which side bears the burden of proof and against what standard those elements will need to be proved. The judge will generally take the jury through the evidence and, importantly, point out any defence which the evidence discloses. The judge sums up and then it is left to the jury to decide the facts. In civil cases it is for the judge to determine matters of law that arise during the proceedings on hearing submissions from the opposing parties.

At the end of the trial, the jury will deliver its verdict, which, unlike many inquisitorial systems, need not be accompanied by reasons. In law, the term 'not guilty' carries a specific legal meaning and essentially means that the prosecution has failed to discharge the burden of proof. Similarly, in a civil trial the judge will determine the case having drawn conclusions on the factual evidence, combined with a determination of points of law.<sup>73</sup>

What is it that makes us more likely to believe a version of events? Answering this question helps to evaluate the efficacy of the adversarial trial system as opposed to the inquisitorial method. The manner of questioning and the skill of the advocate is clearly intrinsic to the outcome of the adversarial trial. Whether or not a skilled advocate opposing an unrepresented defendant or a litigant in person in civil proceedings, really assists in finding the truth is highly questionable. The skilled advocate may win the case, but this in itself does not ensure any accuracy in terms of finding the best version of the truth. The adversarial system is such that the advocate is concerned only with persuading the court

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<sup>73</sup> Douk J and McGourlay C, *Evidence in Context*, 4<sup>th</sup> edition, Routledge 2015 41

to a particular view rather than having a neutral role in providing information leading to the truth.

Clearly, the robustness of the witnesses plays an important part in the outcome of the adversarial trial. Is a timid, slightly nervous witness, in reality, any less likely to provide an accurate account and to what extent should the demeanour of a witness be a key focus? By comparison, the inquisitorial system places less reliance on the performance of the witness than the enquiry into the quality of the evidence taken as a whole.

The opposing parties in the adversarial system enjoy almost complete autonomy in controlling the information brought before the court. It is a matter for the parties in the adversarial trial system to decide on the evidence to present and which witnesses to call. A basic premise of a system in which the parties control the evidence brought for the court's consideration is that the witnesses rarely have free reign to give their own versions of events to the court. Rather the advocate controls the questions that are asked, and a witness may not be given any opportunity to tell the court the version of the events they would wish to have heard. Witnesses have no separate legal representation and are entirely at the control of the questioner. Given advocates are pursuing the goals of those who instruct them rather than assisting the fact-finding process from a neutral stance can it really be argued that the most appropriate and relevant information will be uncovered? Of course, the importance of the role of the judge in trial outcomes should not be underestimated having regard to the influence of the summing up together with judicial directions and findings impacting significantly on the outcome. But a system in which all the public officials are independent and focused on seeking the truth, places even more emphasis on enquiry rather than a contest.

The rules of evidence govern all aspects of the adversarial trial from procedure to content. The impact of the rules of evidence will be considered below.

## 1.4 Perceptions of the Traditional Trial

Logic dictates that absolute certainty of the truth cannot be found through any system, whether adversarial or inquisitorial. Enhancing procedural fairness is always a question of appropriate compromise. The best that can be sought is a court process that is accepted as legitimate in being an acceptable version of the truth acquired from a reconstruction of past events. But it is important to review and challenge any assumptions about how that challenge is approached, if the legitimacy of current practices is to be argued.

Receipt of live oral testimony, the principle of orality, is perceived as the most compelling means by which the reconstruction of past events has occurred in the traditional Anglo-American adversarial trial system.<sup>74</sup> While other forms of evidence are received, particularly within the system of the jury trial, hearing what eyewitnesses have to say and assessing the testing of that recollection is key to evaluating a version of events which amounts to the closest approximation of the truth. It is clearly important in such a system that the evidence presented by the party wishing to reconstruct past events to support its contention on those matters in issue is as persuasive as possible. A particular level of probity will be essential for the party required to discharge the requisite standard of proof. The burden of proof falls to be discharged in accordance with the rules applying to any given hearing and varies in terms of its standard. This is dependant on the nature of the matters in issue and the party required to adduce evidence in respect of any particular issue. This burden is at its highest in a criminal trial, and that upmost standard applies only to the prosecution. The obligation placed on the prosecution in a criminal trial relates to the issue of an accused's guilt and is set at 'beyond reasonable doubt'. This is also expressed as being 'satisfied so that you feel sure' and is set out in the formula suggested by Lord Goddard CJ in *Summers*.<sup>75</sup>

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<sup>74</sup> Fact scepticism and the construction of knowledge Dennis I, *The Law of Evidence*, 4<sup>th</sup> ed., Sweet & Maxwell 2010 116

<sup>75</sup> [1952] 1 all ER 1059 at 1060

If a jury is told that it is their duty to regard the evidence and see that it satisfies them so that they can feel sure when they return a verdict of guilty that is much better than using the expression reasonable doubt and I hope in future that will be done.

Whatever the manner in which the jury is directed, whether using the formula 'beyond reasonable doubt' or with further elaboration provided through judicial explanation, there can be no doubt that the persuasive quality of the evidence presented will be pivotal in the process of deliberation undertaken by the triers of fact. It is for this reason that the perception of the criminal trial is key to understanding the importance of the principle of orality. Once this is understood, the way in which it has evolved and been modified to a much greater extent in those venues without a jury can be seen more clearly. Other than the requirement for the prosecution to discharge the highest burden on the issue of guilt all other burdens, whether arising in civil or criminal proceedings, fall to be discharged either on a balance of probabilities or simply on the basis that an issue has been raised sufficiently well to warrant consideration. This lower standard is the evidential burden and often referred to as 'the duty of passing the judge' so that it is only required to be sufficient to justify its part in the determination of matters in issue.

What is open to question is the rationale for having the principle of orality as the starting point from which all techniques of adducing evidence develop. If other means are an equally valid route to the discharging of the burden of proof in any given scenario, why not make that procedural approach to the receipt of evidence the starting point?

The answer to the embedding of the principle of orality in the traditional system may simply be an acceptance of its prevalence rather than any greater logic based on a modern system of justice. For the legal system to be viewed as legitimate, it must be accepted as producing fair outcomes by its officials and the society it serves. As such, the public and professional perception of what makes a trial a valid process is crucial. The assessing of evidence in open court is the means by which we accept a just outcome has been achieved. It has become embedded thanks to the influence of popular cultural portrayals of the trial process and the resultant 'big reveal' of the truth, and has a long history in the UK. The way in which the traditional trial system is perceived, particularly by the public, requires

consideration of a broad swathe of disciplines not least of which is psychology and philosophy as much as matters of black letter law.

Eminent writers on the subject such as Jeremy Bentham<sup>76</sup> contributed arguments of academic gravitas to the rationale for the adversarial trial system. However, a less weighty, but perhaps more accessible, understanding of the perception created in the mind of the public by the traditional trial process can be found in the images and messages created through the modern media from the late 20<sup>th</sup> century onwards. An insight into the value of the principle of orality in the fact-finding process can be seen in television series, such as *Crown Court* broadcast by Granada Television,<sup>77</sup> which ‘gripped daytime television audiences’ between 1972 and 1985.<sup>78</sup> Predating the subsequent era of so-called reality television this series was an early insight into the reality of the traditional Anglo-American trial system. Given that no trial proceedings are televised in the UK, and very few members of the public have attended a trial, the importance of determining a case based on eyewitness evidence is drawn largely from media accounts.

Courtroom dramas have always and continue to play an important role in the public perception of the UK trial as a just and appropriate means of truth finding. This relatively early drama series sought to portray those proceedings accurately in terms of the receipt of evidence and in terms of court procedure and personnel. For more than a decade a large audience would follow a *Crown Court* trial in the fictional Fullchester Crown Court. What was so innovative and influential on the minds of the British public was the use of real legal professionals in the running of proceedings. The fictional cases used actors, so to that extent the case would be scripted. However, the production came as close to a replication of the reality of trial procedure as possible, by selecting members of the public to act as jurors and in all other respects following correct procedure. As such television audiences became familiar with the concept of the principle of orality as the key to determining disputed issues of fact. Assessing what is said in live oral testimony and evaluating its

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<sup>76</sup> *The Rationale of Judicial Evidence* (London: Allen and Clark, 1827)

<sup>77</sup> Granada television 1972-1984

<sup>78</sup> *The Independent* (2006)

strength based on the testing of skilled cross-examination became embedded in the perception of the public in the modern media age. The series was hugely popular and demonstrated an intense public interest in the human drama played out through court proceedings. Very few members of the public will have engaged with real cases, but almost every member of the public has engaged with the media portrayal of the Anglo-American system of justice. This TV series sought to engage the public with the range of difficult social issues requiring determination through the court system. The perception at the start of the case would often lead to a plot twist through the unravelling of a witness during the course of cross-examination. This portrayal of the principle of orality as the means by which the truth can be found may well stem from traditional or historic origins but is perpetuated in the modern age through current public perception as to its importance. The majority of the public would not consider other means of receipt of evidence to be a real trial. This idea of what makes a trial fair and affords a realistic reconstruction of past events continues to be reinforced through ever-growing media influence.

The nature of the trial beyond the public perception of its importance is affected by a range of other factors. Whether civil or criminal in nature, disputed matters must be resolved within a reasonable timeframe and at a predictable expense. The time and cost of proceedings have resulted in numerous reforms over the last two decades. While those reforms stemmed principally from a desire to make access to justice in civil proceedings more affordable, and transparent in terms of procedures, a steady increase can be seen in reforms and practice rules relating to criminal procedure to the same ends. The civil procedure rules<sup>79</sup> have since been followed by those of the criminal procedure.<sup>80</sup> The rules for criminal procedure are notable in following their civil counterparts to achieve more expeditious and economic proceedings. The principle of orality does not lend itself to expedition or economy in that the playing out of witness testimony drawn through the procedural hurdles associated with the trial process, examination-in-chief, cross-examination and re-examination, require a great deal of court time and expense in engaging legal professionals. This elaborate process remains the cornerstone of the trial

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<sup>79</sup> The Civil Procedure Rules 1998 No. 3132

<sup>80</sup> The Criminal Procedure Rules 2013 No. 1554

system despite undoubted human fallibility in the ability to provide an accurate recollection of events. Arguably, in many cases, a document-based system of enquiry would be preferable.

Given the importance of the jury in the criminal trial process perhaps the perception of the average juror and the role they have to play is of equal importance in understanding the prevalence of this system of fact reconstruction. It is clear that a direction on the burden of proof, in any forum, but in particular in respect of jury trials is crucial to the proper functioning of the system of adversarial justice. It has been suggested that jurors should be assessed prior to participating in the trial process to ensure that they are appropriate in terms of their capacity to understand the system and reach a decision unaffected by bias. A study on this aspect of jury participation suggests that the verdict reached by a jury can be significantly impaired by bias.<sup>81</sup>

This research from Anglia Ruskin University published on predicting verdicts using pre-trial attitudes and standard of proof is notably published in the British Psychological Society's Legal and Criminological Psychology journal rather than being research undertaken by lawyers. The study concludes that the bias of jurors prior to the trial may significantly affect the ultimate verdict. This is irrespective of the evidence in the case and is based on preconceived ideas, or prejudices, in the minds of a significant proportion of the public. This research tends to suggest that hearing about events from a witness giving a live account of events may be less compelling than has previously been perceived and supports the view that other means of ascertaining facts in issue have equal, if not greater, value.

The research drew its sample from employees of a company in Cambridge with 118 people being used in the survey and having a broad age range of 19 to 63. Those involved in the survey were asked to consider a particular scenario relating to a fictitious breaking and entry. They were provided only with information relating to the offence itself together with case details and a judicial direction relating to the burden of proof.

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<sup>81</sup> Lundrigan, S., Dhimi, M. K. and Mueller-Johnson, K. (2013), Predicting verdicts using pre-trial attitudes and standard of proof. *Legal and Criminological Psychology*. doi: 10.1111/lcrp.12043

Of interest to the validity of the principle of orality as the means by which verdicts are delivered was a finding that pre-existing attitudes affecting the mindset of the juror influenced just over a third of verdicts. Given that the traditional adversarial trial uses direct oral testimony as its bedrock, the study questions the validity of the principle of orality as the means by which verdicts are reached. If as many as a third of verdicts are to some extent preconceived and influenced by pre-existing prejudice, rather than the evidence, the value of listening to eyewitness accounts and testing those accounts through the formal constraints of adversarial questioning may be flawed to a more significant extent than would be imagined by the vast majority of those considering trial, in its traditional sense, a valid means of reaching a decision.

The study suggests a means by which this can be tackled would be pre-trial questionnaires to assess the extent to which jurors are capable of properly participating in the trial process.

The jury system in the UK works well, and most of the time the verdict is the right one, but inevitably when dealing with human beings, there will be extra-evidential factors that affect jurors' decisions.<sup>82</sup>

While the study was undertaken by psychologists, it was reported to practicing lawyers in the widely read practice publication 'The Law Society Gazette'.<sup>83</sup> Comments reported from readers in the publication reflect opinions of practicing solicitors:

Dr Lundrigan is of course right but that does not necessarily undermine the value of the verdict, nor does it necessarily work against the Defendant. One should not forget the affect that juries had in the abolition of the death penalty in the UK. Juries rightly reflect attitudes of the public.

As for the notion of beyond reasonable doubt, that is a very legalistic notion that lay people do not grasp. However the average juror seems to have a better grasp of this

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<sup>82</sup> *ibid*

<sup>83</sup> 'Bias has 'significant' effect on verdicts, jury research says' (2014) LS Gaz

concept than Lay Magistrates. Few of them understand what it means and even fewer apply it. They are much more likely to find guilt in the face of reasonable doubt than any juror and they really ought to know better. Perhaps that is where Dr Lundrigan should be focusing her attention.

An enlightening insight into the view taken by those in everyday legal practice towards the value of academic research is also available in response to the study:

Also, this is not a matter for academics I am afraid, it should be left to practitioners. The world they each live in are diametrically opposed.

Perceptions of both the trial process and its participants will remain the subject of continuing debate and affect attitudes towards reform of this traditional system.

## **1.5 The Law of Evidence**

Many students of the system of litigation, whether civil or criminal, find the rules governing procedure complex but none so perplexing as the rules of evidence. Those engaged in navigating a transactional system of litigation rarely question the need for the law of evidence with its artificial network of rules limiting that which may be considered by the court and the procedure by which it will be brought before the court. The rules of evidence grew owing to the nature of the adversarial trial system and are far more relaxed in inquisitorial systems. Given the parties drive the proceedings within an adversarial framework (courts do not initiate any procedure of their own volition), it is seen as necessary to have rules restricting the material upon which reliance is placed to prove a disputed issue. Historically it has been argued that all information relevant to the case ought to be placed before the court for consideration without restraint.<sup>84</sup> Modern requirements of the right to a fair trial set out in the European Convention on Human Rights and enacted in the Human Rights Act 1998 ensure the continuing development of

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<sup>84</sup> Jeremy Bentham, *The Works of Jeremy Bentham*, vol. 7 (*Rationale of Judicial Evidence Part 2*) [1843]

rules to protect the accused and to limit that which the prosecution may adduce to discharge the burden of proof beyond reasonable doubt.

It follows that the rules of evidence applicable within civil proceedings are generally more inclusionary in nature, whereas those seen in the system of criminal justice tend towards being exclusionary. Even in respect of evidence satisfying the rules of admissibility within criminal proceedings, it is always possible to argue that the inclusion of a particular piece of information is unfair. This is set in section 78 of the Police and Criminal Evidence Act 1984 which provides:

- (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
- (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

Notably, this provision relates to prosecution evidence only. Given the burden placed on the prosecution to adduce evidence at the highest level, to prove guilt beyond reasonable doubt, the requirement to demonstrate procedural fairness provides part of the explanation for the continued development of evidential rules; this limits that which may be considered by the triers of fact in criminal proceedings. This idea of an exclusionary discretion has developed alongside the principle of orality so that the way in which a story is told differs to a very great extent by comparison with the way the veracity of an account is assessed in everyday life in the absence of these restraints. When deciding what to believe in any other context, account is taken of everything available that is of relevance on the issue. The media does not restrict itself in the way that the courts do, and neither do individuals when drawing conclusions based on all the available information. The principle of orality provides for the controlled receipt of oral testimony tied up in a web of evidential regulation. It is not possible to understand the rationale for a continuance of the

principle of orality without a clear understanding of the rules of evidence applicable in both civil and criminal proceedings. Many of those rules are important in a movement towards reform. However, the way in which rules central to the receipt of evidence have developed differently in the civil and criminal systems explains the much greater erosion of the principle in civil cases. Criminal procedure has frequently developed to follow reform tested initially within the civil context and an analysis of the importance of the huge movement towards reform started by the introduction of the Civil Procedure Rules<sup>85</sup> in 1998. Civil procedures will be considered in Chapter 2 of this thesis.

While numerous rules of evidence have an impact on the principle of orality, the rules relating to hearsay evidence are particularly important. No other rule of evidence restricts to any greater extent that which may be said or written by witnesses in the course of providing direct testimony. The rule against hearsay goes to the heart of the principle of orality in that the witness giving evidence by means of a factual account must limit that account to their own eyewitness perception unless the hearsay rules permit reference back to a previous out-of-court statement. The erosion of the principle of orality appears to track the reduction in formality associated with the use of hearsay evidence.

A relaxation of the hearsay rule first started in civil proceedings<sup>86</sup> and is currently reflected in the Civil Evidence Act 1995. The rule against hearsay applies to the use of anything said or written outside court to prove the matters stated. The existence of the hearsay rule links closely with the principle of orality in that all the evidence falling to be assessed by the court must come from that which is brought to the court from a first-hand eyewitness account. Once the rule against hearsay became eroded so did the necessity of receiving evidence from a live oral account. The extent to which the rule has been eroded within civil proceedings demonstrates the effect of a movement towards the receipt of documentary evidence, in common with more inquisitorial systems of justice, on the principle of orality. The Civil Evidence Act 1995 specifies that evidence shall not be

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<sup>85</sup> The Civil Procedure Rules 1998 No. 3132

<sup>86</sup> Civil Evidence Act 1968

excluded on the grounds that it is hearsay and simply prescribes procedural requirements to ensure a fair balance between the parties within a civil dispute.<sup>87</sup>

In criminal proceedings, the rules governing the receipt of hearsay now follow a pattern once applicable in civil proceedings under earlier legislation<sup>88</sup> and are set out in the Criminal Justice Act 2003.<sup>89</sup> However, these provisions went further than ever before in criminal litigation. Not only were specific criteria set for the admission of hearsay evidence but for the first time a general interests of justice provision was formulated, for the introduction of hearsay in addition to the other provisions set out for the receipt of hearsay within the legislation.<sup>90</sup> Even with the very considerable reform of the hearsay rule, its existence places a barrier to the witness giving evidence and preserves the need for direct oral testimony given live before the court, with all that is inherent within that process. A particularly important consequence of the rule against hearsay is the effect it has on vulnerable and intimidated witnesses, who would benefit greatly from receipt of their evidence in a hearsay format and thus avoid the trauma of exposure to the court room.

The necessity to re-evaluate the faith placed in receipt of testimony from a witness by presenting it live to the court has been questioned over a number of decades and resulted in very significant reform to the principle of orality. The most difficulty experienced in coping with open court as a forum for providing evidence is those who are young, vulnerable and possibly intimidated. This will be considered as one of the most important and compelling arguments relating to the reform and re-evaluation of the principle of orality as a starting point for the consideration of evidence, in Chapter 4 of this thesis.

The rules of evidence provide important controls relating to the nature of questioning and techniques of advocacy. The dominance of the advocates within the traditional trial system results in a suppression of the ability of witnesses to give their own account. Rather, the principle of orality results in a very artificial, highly controlled, version of the evidence and is arguably not the best means by which witnesses can most effectively tell the truth.

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<sup>87</sup> CPR 33

<sup>88</sup> Civil Evidence Acts 1968 to 1972

<sup>89</sup> Chapter 2 of part 11

<sup>90</sup> Criminal Justice Act 2003 s114

Regulating witnesses through the rules of evidence in this way results in the account given being selective rather than a warts and all version. The witness is the source of the information upon which a decision is based yet the account given is artificially controlled and tested in such a way such that the full story can often not be told.

Evidence must always be relevant to be admissible, however, owing to the rules of admissibility, much relevant evidence will find itself excluded. Relevant evidence is that which is either probative or disapprobative of some matter which requires proof.<sup>91</sup> Given that the rules of evidence exclude relevant evidence on the ground of some technical or discretionary basis, it is arguably a significant restriction on the possibility of giving an accurate account, which is sufficiently complete to allow for a fair decision. As eyewitness recollection is so inherently fallible, to further restrict the circumstances and completeness of the recollection by reliance on the principle of orality as the main means by which that recollection is given must be open to criticism. Numerous academic writers have questioned the ability of live oral testimony to correspond with past reality. This has given rise to considerable scepticism in the current system of construction of knowledge from artificially structured questioning about past events:

the correspondence theory, which aspires to a faithful present application of a past reality, promises a goal that remains permanently illusive. At all stages of the legal process the necessary conditions provide scope for error in fact finding. In consequence, for the purposes of use in a practical but imperfect world, the correspondence theory has had to settle for the truth of past events to be treated as a matter of probability rather than certainty.<sup>92</sup>

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<sup>91</sup> *DPP v Kilbourne* [1973] 2 W.L.R 254, HL

<sup>92</sup> Dennis I, *The Law of Evidence*, 4<sup>th</sup> ed., Sweet & Maxwell, 2010 116

## **1.6 Conclusion**

Arguably the formulaic approach to the receipt of testimony is open to question on numerous grounds. The real justification for an adversarial approach has been questioned, and considerable movement towards a more inquisitorial approach has taken place. However, for all the reforms seen in both civil and criminal procedure, the starting point remains the principle of orality. None of the various reforms across a broad spectrum of procedures within the system of adversarial litigation abandons the established approach to truth finding entirely. The receipt of first-hand accounts is still the means by which most disputes are resolved. Walk into any magistrates' or county court trial on any day and the overwhelming importance of the credibility and persuasive quality of what witnesses have to say is apparent.

The real issue is whether this would remain so if the system were to be reconstructed without constraint. From the outset, the argument for a review of the appropriateness of systems for the receipt of testimony spans both civil and criminal litigation. Currently, reforms focus on correction of flaws to enable the flow of proceedings in particular circumstances rather than addressing the more fundamental issue of the suitability of the process and whether, if starting with a clean sheet, the way forward would be a modified procedure or a wholly new framework.

## CHAPTER 2 – THE CIVIL PROCESS

### 2.1 Introduction

There is a tendency in discussions of fairness in trial procedures to focus on the world of criminal litigation. That is not to say that civil litigation has been ignored in the very considerable era of litigation reform during the early part of the 21<sup>st</sup> century, but, the thrust of that reform has focused on achieving costs savings and optimising efficiency, with little attention paid to the place of the principle of orality from the perspective of the witness experience. However, much of the fundamental reform of the system of civil litigation brought about by the introduction of the Civil Procedure Rules 1998<sup>93</sup> has crept into criminal litigation. Any evaluation of the place of the principle of orality within the modern litigious environment must consider the development of the system of civil justice in order to consider the appropriateness and likely direction of future trial procedures properly. Reform established within civil procedure may migrate to criminal litigation (considered below). However, the starting point is modification rather than structural reform.

This chapter focuses on the current place and of orality in civil litigation, both officially but also via its embedding into the training, experiences and, thereby, assumptions and norms of the legal profession. This understanding is essential to provide the necessary grounding, on which to base more detailed analytical content on that appropriateness of its role and a comparison with criminal litigation. Review and analysis of trial procedures across both civil and criminal litigation is considered in the context of expert opinion evidence in the following chapter (3). This demonstrates the necessity for a bridge in policy across fora.

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<sup>93</sup> The Civil Procedure Rules 1998 No. 3132

## 2.2 The Civil Trial Procedure Prior to the Woolf Reforms

Lord Woolf's ground breaking report, *Access to Justice*,<sup>94</sup> brought about a permanent change to the landscape of civil litigation. The civil procedure rules brought those changes into the system and came into operation on 26 April 1999. In order to understand the need for such radical reform, consideration of procedure, and in particular the place of the principle of orality within civil trials, is required.

As a civil litigator able to remember the era of writs, plaintiffs, interrogatories, discovery, pleadings and most importantly the need for sworn evidence in the form of affidavits, for even the most straightforward case of modest value, it came as no surprise that such radical reform was eventually brought into operation. As an articled clerk new to litigation in 1986 being asked by a principal (at that time the system of training solicitors required articles of clerkship with a senior solicitor acting in a supervisory capacity as a principal) to prepare a note for a client bemused by the system of civil litigation, it was apparent the system needed reform.

In particular, there was a need to explain the protracted and costly nature of proceedings. Cases in the civil courts were run almost entirely by the parties themselves, rather than being closely managed and monitored by the court. This had long been the accepted norm and, while hard to explain to the client looking for a solution to a dispute, was largely accepted by the world of legal practice. Nothing in civil litigation training at the time suggested anything other than a grinding costly process moving towards resolution at trial. There was very little to prevent costs spiralling out of control and in many cases exceeding the value of the claim itself. The note prepared for the client sought to explain that all these procedures were moving inexorably towards the trial process. The determination of the dispute, through a judgment drawn from the evidence presented to the court, was the focus for all those involved in civil litigation. In respect of all levels of civil litigation, the lengthy process of setting out the claim and ultimately moving towards the collation of

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<sup>94</sup> *Access to Justice* Lord Woolf, Master of the Rolls Final Report 1996

evidence in the form of affidavits was driven by the place of the principle of orality in the trial process. The idea that evidence must be received in sworn format presupposed that affidavits would be the only means of ensuring reliable testimony. The system considerably inflated costs in that affidavits, prepared by the litigant's own solicitor, could not be sworn by that solicitor and must be sent elsewhere to ensure the veracity of the statements set out within the document. This would incur an oath fee in addition to considerable extra layers of procedural steps.

The conclusion drawn in the note prepared for the client in the 1980s was that the current system of litigation, while understandably perplexing, was driven by the need to present oral testimony to be assessed either within a County or High Court trial and must be accepted as how a civil dispute would be determined. The note prepared for the client expressed regret that the system did not focus more on the value of the claim and settlement without the need for such costly and time-consuming procedures.

The trial itself, even when it related to matters of straightforward legal issues and modest value, would be heard in full with all witnesses whose evidence could not be agreed in attendance. The process was governed by Rules of the Supreme Court (The RSC) and the County Court Rules (CCR).<sup>95</sup> The trial process ran in accordance with the principle of orality developed through the traditional Anglo-American adversarial trial system. This would mean that the party bringing the litigation, at that time known as the plaintiff, would be required to present all those witnesses of fact to the court to give an oral account of the matters in issue in the case. In true adversarial style, this would be followed by cross-examination by the opponent's advocate to undermine the account of the witness and highlight inconsistencies in the witness's first-hand recollection of those matters relevant to the issues in dispute.<sup>96</sup> Following this, there would be an opportunity to address those issues arising in cross-examination, with the party whose witness had been tested in cross-examination conducting re-examination in an attempt to repair the damage done to the

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<sup>95</sup> The rules were made pursuant to the Supreme Court Act 1981 and the County Court Act 1984

<sup>96</sup> McEwan J, *Evidence and the Adversarial Process*, 2<sup>nd</sup> ed., Oxford 1998

oral testimony. Rather than this system of civil justice having been constructed as the most appropriate for the resolution of disputes between private individuals, it had simply evolved historically and rested on the premise of the principle of orality as the best means by which the truth can be found. Given there was little differentiation between lower and higher value cases, this protracted process of oral presentation caused costs to escalate in a manner which often became prohibitively expensive. The question leading to Lord Woolf's report was whether access to justice existed for all but the wealthiest litigant.

This system of slow and expensive civil justice continued into the 1990s. The outcome of civil litigation, although it could be predicted to some extent through case analysis, remained uncertain and was arguably far too adversarial in nature. From the outset clients found the procedures impenetrable, the outcome unpredictable and, most difficult of all, the cost of litigation was capable of spiralling with no limitation proportionate to the importance and value of the claim. Prior to Lord Woolf's report, access to justice was possible only for those of very substantial means or those falling within a very restricted group of litigants entitled to civil legal aid. Justice was not being delivered in a way acceptable to the majority of litigants, and it was necessary to pursue a radical new policy to reduce litigation and forge ahead with a new system of dispute resolution. A rather problematic aspect of any reform would be the place of the principle of orality given the adversarial nature of the English trial system. Lord Woolf's proposed reforms did move the process of litigation away from the determination of the dispute by reaching trial towards a more carefully managed system promoting earlier settlement:

Pre-action protocols. These are intended to build on and increase the benefits of early but well-informed settlements which genuinely satisfy both parties to a dispute. The purposes of such protocols are:

- (a) to focus the attention of litigants on the desirability of resolving disputes without litigation;
- (b) to enable them to obtain the information they reasonably need in order to enter into an appropriate settlement; or
- (c) to make an appropriate offer (of a kind which can have costs consequences if litigation ensues); and

(d) if a pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings.<sup>97</sup>

However, the principle of orality was not in itself tackled. The civil procedure rules amend and adjust the principle of orality rather than starting with a clean sheet, as was the case with so many aspects of civil litigation in the wake of the Woolf report.

### **2.3 A New Era of ‘The Overriding Objective’ and the Pursuit of Optimum Efficiency (Woolf and Jackson)**

Civil litigation was reviewed by Lord Woolf, with the introduction of wide-ranging reform coming into effect on 26 April 1999.<sup>98</sup> The implementation of Lord Woolf’s reforms was undertaken through the development of the civil procedure rules. The rules sought to translate the philosophy of the report, Access to Justice, into a hard and fast system of civil procedure. Lord Woolf’s report acknowledged the difficulties existing in civil litigation and sought to address the expense, slow pace and inaccessible nature of the previous system. However, while the adversarial nature of civil litigation was addressed in an attempt to improve access to justice, the principle of orality was not reviewed afresh. The civil procedure rules instead modify the principle of orality rather than question its appropriateness within this modernised system.

One of the most important aspects of the Woolf reforms was the new concept of the overriding objective acting as a reference point for the overall conduct of civil litigation. The overriding objective sets out an expectation for the conduct of civil dispute resolution and is to be applied prior to the issue of proceedings and throughout all stages of the litigation process to a final determination. The principle of orality must be considered in the light of the overriding objective as the length and cost of proceedings could no longer be disregarded, and the process of receiving oral evidence continue unhindered by the value and complexity of the case. The effect of the overriding objective contained in CPR 1

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<sup>97</sup> Access to Justice Lord Woolf, Master of the Rolls, Final Report 1996 at Ch. 10.1

<sup>98</sup> Civil Procedure Rules 1998 (CPR 1998) (S I 1998/3132)

should not be underestimated. It provides a springboard into the rules and sets a new framework in place. In an attempt to provide procedures which could be accessed by users of the civil justice system the overriding objective was formulated to act as a gloss on all aspects of civil procedure including the place of the principle of orality within the system.

The tenor of the overriding objective is clear:

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

The effect of CPR 1 needs to be considered in practical terms. In order to deal with cases justly, the court ought not to deny litigants access to the system simply because of a slight technical error. In its purest form, the adversarial trial system sought to exploit the technical slips of opponents rather than to seek a just resolution of the claim. Following the introduction of the overriding objective a slip such as inadvertently starting a claim in

the wrong court ought not to result in that claim being shut out but rather the claim should be transferred to the appropriate venue.<sup>99</sup>

A rather difficult concept is that of the parties being on an equal footing. Litigants frequently command different resources. Given the lack of access to government funding for civil litigation, some litigants will be able to afford more expensive lawyers than others. This is key to the principle of orality, given the preparation required to move towards a successful trial. Competent specialist litigation lawyers will best prepare all the preparation leading up to that point. However, the concept of being on an equal footing set out in CPR 1 does not extend to preventing one party from instructing lawyers who would be beyond the means of the opposing party.<sup>100</sup>

In order to deal with cases expeditiously and fairly while saving expense, the court has very extensive powers of case management which will be considered below. The court's approach to the avoidance of litigation continuing for an indefinite period was demonstrated in *Adnan v Securicor Custodial Services Ltd.*<sup>101</sup> In that case, a request to delay the consideration of damages until the end of the claimant's period of hospitalisation was refused and marked the effect of the overriding objective on what had previously been a point for frequent protraction of the adversarial trial system.

The idea of proportionality within CPR 1 focuses on the value and complexity of the claim and links very closely with active case management and the control of costs. The continuing focus on case management and the control of costs is considered in more detail at section 2.6 below. This determined drive towards optimum efficiency and the pursuit of proportionality to allow for a reasonably affordable system of civil justice rested on a shift towards judicial control and a reduction in the adversarial nature of litigation. In its purest form, the adversarial trial system drives towards a judgment based on the receipt of oral evidence no matter the cost involved. A less adversarial approach requiring a

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<sup>99</sup> *Cala Homes (South) Ltd v. Chichester District Council* [1999] The Times, 15 October 1999

<sup>100</sup> *Maltez v. Lewis* [1999] The Times, 4 May 1999

<sup>101</sup> [2005] PI QR 79

proportionate response to resolving issues in dispute moves away from the goal of obtaining a judgment at any cost. Costs need to be predicted in advance if the concept of proportionality is to be effective and as such, must link closely to the value and complexity of the claim. This concept has had a very significant impact on the principle of orality in that it has been necessary to modify it to achieve proportionality within civil trials, rather than letting oral evidence take as long as is necessary as had been the norm in the traditional civil trial framework. The real difficulty is justifying why the principle of orality was modified to such a great extent that it has become almost unrecognisable in certain categories of civil trial. Rather than modifying the principle of orality, the question to be considered is whether it was necessary to have it as the starting point?

Perhaps it would have been preferable, and feasible, to construct a more appropriate means for the determination of disputed issues without the need to receive evidence from witnesses of fact in live oral form. The extent to which the principle of orality remains intact depends largely on the value of the claim. If the receipt of oral evidence is the accepted means of deciding which version of facts to prefer is it any less important to achieve that aim in cases of lower value? The outcome of litigation for private individuals pursuing a claim of around £20,000 may be just as important, if not more so, than a corporate dispute running at around £100,000. The private individual will have a curtailed version of the traditional civil trial, whereas the corporate litigation will play out in full. Research has yet to be undertaken as to the effect of the reduced receipt of oral testimony. Still, if it remains for higher value claims, it must surely be considered preferable. If the abridged version of civil trials is just as effective, why not use it for all matters?

In the implementation of the Woolf reforms, significant steps have been taken to ensure the system of civil litigation is tightly controlled. However, no re-evaluation of the necessity for the principle of orality within the system of civil justice was undertaken. How the principle of orality has been modified to meet the requirements of the new system is considered within the case management system seen as so important in the Woolf report:

In Chapters 6 and 8 of my interim report I described the introduction of judicial case management as crucial to the changes which are necessary in our civil justice system.

Ultimate responsibility for the control of litigation must move from the litigants and their legal advisers to the court. The reaction to this key message in my interim report has been extremely supportive.<sup>102</sup>

The place of the principle of orality in civil trials remains an unresolved question. Given the extent of its modification in particular categories of civil claim to achieve cost savings, is the receipt of first hand oral testimony the best way to deal with the determination of disputed matters of fact at all?

In some areas of civil litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice.<sup>103</sup>

Lord Justice Jackson set out the premise upon which the next tranche of civil justice reforms would be recommended in his final report published December 2009 and brought into force on 1 April 2013.<sup>104</sup>

The fine detail of the reforms implemented following Lord Justice Jackson's recommendations is outside the scope of this thesis. Its broad impact on the place of the principle of orality requires consideration. In consolidating the Woolf reforms, Lord Justice Jackson sought to improve access to justice through the control of costs with new budgeting requirements and the wholesale reform of civil funding arrangements. The Jackson review did not question the success of the Woolf reforms but sought to build on those reforms to further ensure the conduct of litigation would be consistent and proportionate:

It was a review that was not intended to question the shifting judicial philosophy in civil litigation affected by the overriding objective, which was acknowledged and

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<sup>102</sup> Lord Woolf at Section II of the final report 'Case Management'

<sup>103</sup> Rupert Jackson foreword of *The Review of Civil Litigation in England and Wales*, R. Jackson 2010

<sup>104</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012 part 2

endorsed by the House of Lords in *Three Rivers*<sup>105</sup> it was to identify why and how it had not properly taken effect and how that failure could be remedied<sup>106</sup>

While the entire focus of the Jackson review was to ensure the control of costs the resultant reforms entrenched the importance of case management and the modification of the principle of orality depending on the value and complexity of the claim. Whether or not continuance with the principle of orality as the starting point for the determination of disputed matters of fact was the best way forward fell outside the scope of these reforms. The new provisions do, however, have a very significant impact on the continued use of the principle of orality in civil trials for many litigants seeking to access justice within this revised funding landscape.

However, the Master of the Rolls in his speech<sup>107</sup> addressing district judges does consider the effect of proportionality and the management of costs on the traditional approach to securing justice:

In such circumstances it is easy to see why, not least given the long heritage we have of striving to the secure justice on the merits in each case and intuitive understanding that doing justice is to reach a decision on the merits, mistaken assumptions took hold. This was compounded by the failure to make explicit in the overriding objective that it includes a duty to manage cases so that no more than proportionate costs are incurred...<sup>108</sup>

Plainly, given accepted reforms and continuing government policy, the principle of orality will continue to be modified to ensure compliance with the overriding objective in its limitation of costs in accordance with the importance now placed on the concept of proportionality within the conduct of civil claims.

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<sup>105</sup> *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3) (Three Rivers)* [2003] 2AC 1 106

<sup>106</sup> Lord Dyson MR District Judge's annual seminar Judicial College 22<sup>nd</sup> March 2013

<sup>107</sup> *ibid*

<sup>108</sup> *ibid* at paragraph 18

## 2.4 The Continuing Development of the Civil Procedure Rules

The Civil Procedure Rules are a form of delegated legislation made under the Civil Procedure Act 1997. In providing one unified body of rules, the Civil Procedure Rules do not seek to answer absolutely every procedural question which may arise. They are designed to ensure that 'the civil justice system is accessible fair and efficient'.<sup>109</sup> The rules have developed at such a rapid pace as to have evolved into a relatively comprehensive set of requirements, providing almost complete governance of all aspects of civil litigation in the County Court, High Court and the Court of Appeal.

The rules are broken down into 83 parts, each governing an aspect of civil procedure from the overriding objective at the outset to the enforcement of judgments at the conclusion of the process. The way in which the rules are broken down into small procedural steps is supplemented to a very considerable extent by the linked practice directions.<sup>110</sup> Without the practice directions, it would be difficult to interpret the rules, and the inclusion of practice directions was a deliberate policy to ensure that the rules themselves did not become overly cumbersome. By transferring the complexity and detail into the practice directions, the principles and policy could be more readily digestible by those accessing the system of civil justice. Despite the separation of the rules into specific aspects of civil litigation from the outset, the rapid nature of their development has still proved testing for both practitioners and other court users. One of the range of cultural changes brought about by the civil procedure rules is the regularity of significant updating. Updates are brought in by the Civil Procedure Rule Committee which is an advisory non-departmental public body.<sup>111</sup>

In terms of the principle of orality, the continuing updates of the civil procedure rules have a particularly significant impact on its place in the system of civil justice. By 2019 the civil procedure rules reached their 109<sup>th</sup> update<sup>112</sup> averaging between four and five fairly

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<sup>109</sup> CPA 1997, s2 (7)

<sup>110</sup> CPA 1997, s5

<sup>111</sup> CPA 1997, s2

<sup>112</sup> <http://www.justice.gov.uk/courts/procedure-rules/civil> accessed 22 July 2019

complex updates annually. Many of those updates affect trial procedures and bring about very significant modifications of how evidence is received.

At a variety of stages in the litigation process, the continuing update of the rules modifies and shapes the principle of orality to fit the policy-making trends of the Civil Procedure Rule Committee. This revises the rules in order to comply with reforms brought in both the continuance of the Woolf report reviews and the very significant cost management controls brought about in the implementation of the Jackson report. From the outset of the civil procedure rules affidavits were largely replaced by witness statements, thereby reducing the cost and time involved in the preparation of sworn statements. As with all aspects of civil procedure, the structure and content of witness statements is prescribed by those rules with a practice direction<sup>113</sup> constraining how the witness puts forward matters of direct oral testimony. It will be seen in the following analysis of case management and the impact of track allocation to the principle of orality that the significance of this is profound.

No longer does the witness give evidence for the first time at a live hearing but is to a significant extent tied by the very prescriptive content of the practice direction. It is hard to imagine a witness being unaffected by those constraints in the delivery of their version of factual matters. Inevitably to comply with the requirements of the practice direction lawyers must construct the witness statement. However, the witness statement ought to contain the evidence which that person would be allowed to give orally.<sup>114</sup> It is hard to see how the principle of orality is not so significantly affected as to be almost unrecognisable in a system where that which would have been given in live oral testimony is translated within the constraints of a practice direction via a litigation practitioner to form an admissible witness statement. However, the witness's own words should still prevail. It is difficult to envisage how this can be achieved in all cases when the principle of orality has been so significantly shifted into complex requirements of structuring content.

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<sup>113</sup> paras 17 – 20 of PD 32

<sup>114</sup> CPR 32.4 (1)

In *Alex Lawrie Factors Ltd v Morgan, Morgan and Turner*<sup>115</sup> this point was put to the test in a decision by the Court of Appeal confirming that the purpose of a witness statement was to allow the witness to put forward what they would have said in oral testimony, that it ought to appear in the document in their own words. The relevant evidence was the evidence the witness would actually say within the traditional version of the principle of orality, allowing for the giving of direct oral testimony live rather than in advance within a witness statement. The Court of Appeal confirmed that it was not for the lawyer to construct the evidence but for the witness to put forward those matters upon which they would readily be able to speak in cross-examination. The problem, in this case, arose from the use of sophisticated legal language unlikely to emanate from a witness of fact. The example illustrates significant dangers when lawyers construct witness statements and put forward matters patently outside the scope of the normal witness of facts knowledge or ability. The real difficulty lies with the modification of the principle of orality, given that it is preserved to the extent that witness evidence is still seen as prevalent but very significantly eroded in the requirements of the civil procedure rules to formulate witness statements within prescribed technical boundaries.

While the control of witnesses is a hallmark of adversarial proceedings, the conduct of civil litigation has moved to a level of prescription for the receipt of oral testimony not seen prior to the Woolf reforms. The drive towards ever greater efficiency and the control of costs has resulted in a restructuring of the principle of orality dependent on the value and complexity of the case. The pursuit of case management, together with the optimising of costs prediction and control, governs how civil justice is conducted.

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<sup>115</sup> [1999] The Times 18th August

## 2.5 Case Management and the Effect of Track Allocation on the Principle of Orality

Judicial case management is at the fore of the revised system of civil litigation following the introduction of the civil procedure rules. Of all aspects of civil litigation, the control of procedure with the underlying objective of costs reduction has been the greatest shift from the system in existence prior to 26 April 1999. It is not just a judicial power to manage cases but a duty that is now at the heart of the system. No longer is it for the litigants to control the pace of litigation, it is an obligation of the court to ensure proper management of the system. Judicial case management is woven throughout the procedures within the civil justice system and is very clearly set out in the first part of the civil procedure rules 1998:

- (1) The court must further the overriding objective by actively managing cases.
- (2) Active case management includes –
  - (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
  - (b) identifying the issues at an early stage;
  - (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
  - (d) deciding the order in which issues are to be resolved;
  - (e) encouraging the parties to use an alternative dispute resolution(GL)procedure if the court considers that appropriate and facilitating the use of such procedure;
  - (f) helping the parties to settle the whole or part of the case;
  - (g) fixing timetables or otherwise controlling the progress of the case;
  - (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;

- (i) dealing with as many aspects of the case as it can on the same occasion;
- (j) dealing with the case without the parties needing to attend at court;
- (k) making use of technology; and
- (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently<sup>116</sup>

The drive for efficient case management is now taking precedence over the pursuit of justice for the individual. This has been openly acknowledged by the Master of the Rolls, Lord Dyson in his 2013 speech to the Judicial College:

As I have said, one of the problems that has undermined the efficacy of case management has been too great a desire to err on the side of individual justice without any real consideration of the effect that has on the justice system's ability to secure effective access to justice for all court-users. The Court of Appeal has been as guilty of this error as any other court. That the Court of Appeal could in 2011 in *Swain-Mason & Others v Mills & Reeve LLP* [2011] 1 WLR 2735 comment that early, robust, decisions by the Court of Appeal that emphasised the need to take account of the needs of all court-users and not just those of the immediate parties had been lost from view makes the point. The revised rule 3.9, by referring back to the overriding objective, is intended to ensure that such issues cannot become lost again post-April.<sup>117</sup>

Following on from the implementation of the measures brought about after the Jackson report, an ever-tightening system of case management allocates cases to a specific track for the purpose of determining the level of court time and costs that may be incurred in the resolution of the civil dispute. Not only has it become important to predict costs through cost budgeting<sup>118</sup> but the extent to which the principle of orality requires

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<sup>116</sup> Court's duty to manage cases CPR 1.4

<sup>117</sup> Lord Dyson MR District Judge's annual seminar Judicial College, 22<sup>nd</sup> March 2013 at paragraph 22

<sup>118</sup> CPR 44 and PD 44

modification is determined by allocation to a specific case management track. While there are other considerations,<sup>119</sup> relating to matters such as complexity of the issues, the case management rules rest on the amount of the claim and seek to reduce procedures in cases of lower value. So, for a claim worth under £10,000 it is doubtful that the litigants will get their 'day in court' as such claims are allocated to the small claims track.

The small claims track is designed to provide a procedure which is swift, inexpensive and lacks the input of lawyers. Given that ordinarily little in the way of costs can be recovered, the participation of lawyers in the process is minimal. The small claims hearing will not follow the strict rules of the adversarial trial system and can frequently result in a decision based mainly on documents. Oral evidence may be received but without the formality of the usual questioning seen in the adversarial trial system. The rules of evidence are largely inapplicable, and the district Judge running the procedure may modify the receipt of evidence to suit the circumstances of the claim.<sup>120</sup> This departure from the principle of orality is striking in its almost complete abandonment of strict formality in lower value claims. If this approach is sufficiently robust to determine a claim, which for many will be a very significant sum, then the continued adherence to the principle of orality for the remainder of civil justice deserves greater consideration.

For those claims falling between £10,000 and £25,000, the fast track case management system will normally apply.<sup>121</sup> This is the most interesting hybrid when looking at the place of the principle of orality within the revised system of civil justice following on from the reforms brought about by the reports of Woolf and Jackson. A strict timetable is applied to fast track trials to enable completion within one court day. The examination of witnesses is normally limited to 90 minutes for each party. To enable this time efficient approach to the receipt of oral testimony, examination-in-chief is dispensed with and replaced by the witness statements. Those witness statements will have been prepared following highly prescriptive provisions (considered earlier) and stand as if they were the oral testimony of

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<sup>119</sup> CPR 26-28

<sup>120</sup> CPR 27

<sup>121</sup> CPR 28

the witnesses appearing at the trial. However, unlike the small claims track, witnesses still attend and experience immediate cross-examination without having initially given their own first-hand account to the court. This is a rather perplexing procedure for all but the most seasoned professional witness. To face a challenge to testimony given much earlier in the form of a prescribed technical statement without having the opportunity to reiterate a verbal account is disconcerting for most witnesses of fact. This modification of the principle of orality is to ensure optimum efficiency in restricting the use of court time to a day and thereby adhere to the requirements of proportionality in terms both of the use of court resources and the cost budgets being followed by the parties. Whereas a case valued up to £10,000 may seem of real importance to many court users restricted to the small claims track, surely a claim of up to £25,000 will have a very significant impact on most of those allocated to the fast track case management system. For those cases valued at over £25,000, it is possible within the civil justice system to keep the principle of orality intact.

The traditional adversarial trial system prevails for such higher value claims with the full extent of the principle of orality applying to the determination of disputed matters. If in higher value claims the principle of orality remains the appropriate means for determining disputed facts, is it really appropriate to receive evidence in such a truncated form for the remainder of lower value civil trials? Arguably it is just as important for the consumer of modest means to have individual justice as the corporate litigant. While the control of costs is fundamental to allowing access to justice might it not be more appropriate to reconsider the principle of orality as a means of determining disputed issues afresh rather than having a system of modified oral testimony based on the value of the claim?

## **2.6 At All Costs**

It can be seen that the principle of orality in civil proceedings has been modified to a very great extent, dependent on the value of the claim. The issue of costs in civil litigation has developed as a dominating factor in the civil process, without regard to the effect on the value of the principle of orality within the system. The principles relating to proportionality

rather than the principle of orality are at the fore of every consideration at all stages of the process of civil dispute resolution.

This can be demonstrated by consideration of the rules relating to the basis of assessment set out in CPR 44.4. It is crucially important to those engaged in the resolution of civil disputes that the cost of so doing does not outweigh the benefits of seeking access to civil relief. There is little point in pursuing a claim and obtaining a judgment only for it to be nullified by a failure to recover the costs involved in the procedure. Most costs are assessed on the standard basis, and this means that the litigants can expect to receive only those costs that are proportionate,<sup>122</sup> irrespective of whether they were reasonably or necessarily incurred. The requirement to consider proportionality as the most important factor in the assessment of costs on the standard basis was brought into effect for cases commenced after 1 April 2013,<sup>123</sup> before which only those costs which were unreasonably incurred or which were unreasonable in amount would be allowable.

Rule 44.3 (5) determines whether the test for proportionality has been met within the litigation process. Inter-alia the value of the claim must be considered so that even where hearing what a witness has to say may well be the determining factor if the cost of so doing appears to the court to be disproportionate having regard to the value of the claim the principle of orality needs either to be abandoned or paid for by the party placing reliance on it. Consider the circumstances in which an oral contract is for a sum of approximately £15,000 and relates to a design and build project for a conservatory extension to a private residential home. It would not be unusual in such circumstances for an initial estimate to be supplied by a builder with further, fairly complex and detailed, specifications developing as the work progresses. Should a dispute arise at the conclusion of the project the words spoken as part of the oral contract would be crucial in determining both a claim from a builder and a defence and potential counterclaim on the part of the residential homeowner. However, should detailed oral testimony be required having regard to the

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<sup>122</sup> civil procedure rule 44.3 (5)

<sup>123</sup> *ibid*

value of the claim it is most likely the trial would proceed in the fast track<sup>124</sup> and as such the principle of orality would already have been restricted to a process of live cross-examination only. Even this restricted analysis of the veracity of each party's version of oral contractual terms will not be met in costs unless considered proportionate within the meaning of part 44 of the Civil Procedure Rules together with its associated practice direction.<sup>125</sup> So it follows that in a case at a value of considerable significance to a small building concern and a private residential homeowner, the principle of orality, which must surely be at the heart of resolving a dispute as to the oral terms of the contract, would both be modified and potentially disallowed as disproportionate to the cost of proceedings. By comparison, a well-drawn contract between large commercial parties resulting in a dispute at a value of approximately £30,000 would allow for the playing out of the principle of orality and for its associated costs to be met under the normal costs order following on from a multi-track trial.

If the dispute is of smaller value the process by which the truth is determined would be very significantly constrained to the point at which the principle of orality has been modified to the extent of replacing examination-in-chief with documentary evidence or disallowed altogether on the basis of the current costs rules. Notably, a claim of higher value would allow for the full trial process and the receipt of oral testimony in accordance with the traditional view of the principle of orality as the means by which the veracity of oral accounts can be scrutinised. It is hard to justify the continued use of oral testimony in the traditional format if the curtailed version in claims of lower value, but of high importance to the litigants, purports to determine a fair resolution of disputed facts. The place of the principle of orality appears to have been lost amongst calls for the strict control of costs:

Proportionality trumps necessity. The *Final Report* recommended that the effect of the Court of Appeal's decision in *Lownds v Home Office* [2002] EWCA Civ 365; [2002] 1 WLR 2450 should be reversed. Rule 44.3 (2) achieves this by providing that in an

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<sup>124</sup> CPR 28

<sup>125</sup> PD 44, para 3.6

assessment on the standard basis: “the court will ... only allow costs which are proportionate to the matter in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred.”<sup>126</sup>

Civil litigation reforms have focused on the management of costs with seemingly less focus on the place of the principle of orality in civil trials:

An innovation. Costs management is a novel discipline, which was proposed in Chapter 40 of the *Final Report*. Most civil litigation is a form of business project in which the parties invest substantial sums in order to achieve a just outcome. Even justice must have a price. It is not rational to spend £1,000 to recover a £100 debt, however strong and virtuous your claim.<sup>127</sup>

The affordability of civil litigation is clearly something which needs to be managed but what also needs to be considered is whether the means by which disputed matters are adjudicated upon ought to differ dependent on the value of the claim. What is needed is an honest rethink of why we receive oral testimony in its traditional format for higher value claims, more likely to be corporate and government litigants, yet not for lower value claims more likely to involve private individuals and small businesses. A fundamental review of the principle of orality and its place in truth finding in a civil forum may well assist the overall objective of cost saving,<sup>128</sup> while providing a more logical format for the receipt of a factual account which is consistent across all claims. Rather than a variant upon a traditional format dependent on whether the case management is for small claims, the fast track or the multi-track an innovative approach not constrained by the ancient formalities of the traditional Anglo-American trial system may well prove more cost effective and equally valuable in terms of resolving civil disputes for all levels of claim.

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<sup>126</sup> Lord Justice Jackson's paper for the Civil Justice Council conference on 21 March 2014

<sup>127</sup> *ibid*

<sup>128</sup> *The Review of Civil Litigation in England and Wales*, R. Jackson 2010

## 2.7 Evidence in Civil Proceedings

The effect of receiving opinion evidence from expert witnesses is integral to the place of the principle of orality within civil jurisdiction. It will be considered separately in Chapter 3 of this dissertation.

At the heart of the principle of orality is the idea that we test evidence in order to decide which version of events is to be preferred in reaching an adjudication on a disputed matter of fact. As considered above, the cost associated with receipt of evidence in that format is considerable and often disproportionate to the value of claim. Unless agreed by the parties, receipt of the evidence in documentary format is not permissible. Still, receipt of evidence in documentary format amounting to hearsay will, by comparison, normally be admissible subject to compliance with procedural steps.<sup>129</sup> The use of hearsay evidence has developed in such a way that its use in civil proceedings has expanded considerably.<sup>130</sup>

The way in which receipt of hearsay evidence has been modified from the earlier legislation is particularly notable when considered in conjunction with hearsay evidence used in criminal proceedings.<sup>131</sup> The circumstances in which hearsay evidence was once received in civil proceedings through earlier, largely defunct, legislation has been followed in terms of its principles into the current rules governing admissibility in criminal proceedings and will be considered in subsequent chapters.<sup>132</sup> However, the use of hearsay evidence is a clear departure from the principle of orality in that no live testing of oral testimony takes place with the witness of fact, giving an account in documentary format. Given this departure from the principle of orality and the tendency to see the migration of the principles applying in civil proceedings towards the criminal forum, an analysis of the application of the modern rules in civil trials is appropriate.

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<sup>129</sup> CPR part 33

<sup>130</sup> Civil Evidence Act 1995

<sup>131</sup> Civil Evidence Acts 1968 & 1972

<sup>132</sup> Criminal Justice Act 2003, s114 (1)

Section 1 of the Civil Evidence Act 1995 provides that in civil proceedings evidence shall not be excluded on the ground that it is hearsay. It will still be necessary to distinguish first hand from multiple hearsay, but both are now equally admissible under section 1(2)(b). The reason that the degree of hearsay is still relevant is that it may affect weight,<sup>133</sup> and as such links back directly to the principle of orality in that live oral testimony tends to carry greater persuasive force unless there is a good reason why evidence is brought in hearsay format and remains capable of testing.

Hearsay includes oral hearsay through any number of intermediaries and documentary hearsay where human perceptions are recorded in a document.

The overall consequence of the Act is that there is no prohibition on the inclusion of hearsay in civil proceedings only certain procedural requirements which must be complied with.<sup>134</sup> This results in the possibility of inclusion of hearsay evidence in expert reports, statements of case and witness statements.

The Act provides several safeguards against the risks of unfairness resulting from the abolition of the hearsay rule in civil proceedings.

The first safeguard is provided in Section 2 of the Act which provides that any party proposing to adduce hearsay evidence in civil proceedings shall give notice of that fact and on request provide particulars relating to the evidence that it is reasonable and practicable in the circumstances to provide.

The parties may agree to either exclude or waive the notice requirements provided by Section 2. If a party fails to comply with the notice provisions contained within Section 2, the court does not have any power to exclude hearsay evidence as a consequence of that failure. The sanction is possible costs orders and an adverse effect on the weight to be given to the evidence.

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<sup>133</sup> CEA 95 s.(2)(c)

<sup>134</sup> CPR part 33

The procedural requirements are set out in part 33 of the Civil Procedure Rules. Fundamentally, this means that if the witnesses is being called, notice requirements are met by serving the witness statement. If the party placing reliance on the testimony is not calling the witness notice requirements are met by serving the witness statement and informing the other party that the witness will not be present with reasons. In all other cases, notice requirements are met by serving a notice identifying the hearsay; stating it will be relied on and giving reasons for not calling the witness.

The second safeguard is provided in Section 3 of the Act, which provides rules allowing the party on whom notice is served to bring the witness to court for cross-examination. This is an interesting addition to the previous provisions in that it allows for a partial preservation of the principle of orality. It is akin to the process used in fast track trials in allowing examination-in-chief to be replaced by a documentary format but retaining the possibility of cross-examination within the traditional format for testing evidence. Given that hearsay evidence is normally used only in circumstances where the witness is unavailable, owing possibly to illness or geographical location, the retention of the possibility of cross-examination is an interesting hybrid that is unlikely to be used in most practical circumstances. However, seeing this process as a safeguard against the improper use of hearsay evidence again demonstrates the importance within the traditional trial process of the possibility of falling back to the principle of orality as a means by which the veracity of statements is tested.

The third safeguard is provided in Section 4, which gives provision as to weight factors.

Section 4 provides that in estimating the weight to be given to hearsay evidence, the court shall have regard to any circumstances from which any inferences can reasonably be drawn as to the reliability, or otherwise, of the evidence.

The rationale for this third safeguard is to emphasis the need for the court to be vigilant in testing the reliability of hearsay evidence. It is also hoped that this safeguard will discourage parties from deliberately failing to give notice, giving late or inadequate notice,

“hiding” dubious witnesses or concealing weaknesses by the use of large amounts of hearsay evidence. It is just these matters which the more traditional method of questioning in open court during live oral testimony seeks to address. It is notable that in any move away from the principle of orality as how the parties draw out inconsistencies and highlight inadequacies in their opponent’s evidence a safeguard is written in to preserve, in so far as it is possible in documentary format, its traditional purpose of determining the most likely source of the truth. To this end, a ‘check list’ of factors is provided at Section 4 (2) of the Act as follows:

- (2) Regard may be had, in particular, to the following -
  - (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
  - (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
  - (c) whether the evidence involves multiple hearsay;
  - (d) whether any person involved had any motive to conceal or misrepresent matters;
  - (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
  - (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

The fourth safeguard is provided at Section 5 of the Act, which makes provision as regards competence and credibility of evidence.

Section 5(1) of the Act provides that if it can be shown that the maker of a hearsay statement would not have been competent to testify then the statement shall not be admitted.

Section 5(2) of the Act relates to credibility. Where the maker of the original hearsay statement is not called as a witness the act permits the credibility of his statement to be undermined by calling evidence:

- (1) Whether before or after the tendered statement, that he has made another statement inconsistent with it;
- (2) To attack his credit, provided that this could have been done if he had given evidence.

These provisions go some way towards identifying and preserving the means of scrutinising disputed factual evidence which had otherwise been the preserve of the principle of orality. It is clear from the provisions enabling the use of hearsay evidence in civil proceedings that the legislative draughtsmen had regard to the principle of orality in the drawing up of a sequence of safeguards. The provisions in Section 4 relating to the weight that may be accorded to evidence in a hearsay format clearly acknowledge that the persuasive quality of evidence may well be undermined by a departure from the principle of orality. As such Section 4 of the Civil Evidence Act 1995 provides statutory guidance to determine the value of hearsay evidence when the principle of orality is absent as a means by which veracity can be assessed. This series of safeguards acknowledges that a departure from scrutiny through live oral testimony may reduce the persuasive quality of testimony.

The value accorded to the receipt of evidence capable of appropriate testing is plain in the factors considered necessary as safeguards when evidence is adduced in a hearsay format. The rationale for the continued receipt of evidence through live oral testimony in the traditional Anglo-American adversarial trial system ought not to be forgotten in the inexorable drive towards the control of costs. If there is to be a departure from the principle of orality in civil litigation, its justification may be that a more appropriate means

by which veracity can be assessed has been put in place. This may well be perfectly acceptable. However, the justifications appear to be costs driven rather than through the construction of a rationale driving towards the fair administration of justice.

An interesting development in the process of reforming the receipt of oral testimony can be seen in opinion evidence given by expert witnesses. Both in civil and criminal proceedings, the court will more readily receive expert evidence in documentary format. The place of expert testimony and the principle of orality will be considered in Chapter 3.

## **2.8 Categories of Witness in Civil Proceedings**

The principle of orality and its impact upon individuals appearing as witnesses has long been a cause for concern resulting in the very significant reforms considered in detail in Chapters 4 and 5. However, while witnesses may experience some considerable degree of difficulty in attending civil trials, no equivalent provisions have been enacted. Guidance can be drawn from many sources including the Civil Procedure Rules and practice guidance notes produced both by the Advocacy Training Council<sup>135</sup> and the Law Society.<sup>136</sup> Still, no specific comparable provision has been enacted to support witnesses who are vulnerable or intimidated within the civil litigation environment. Part of the difficulty is that civil litigation covers such a wide range of matters, many of which are unlikely to involve vulnerable witnesses and parties in civil procedure. While the wide range of commercial and corporate matters could potentially include such witnesses, there are inevitably fewer trials demanding the range of special measures seen in criminal trials. As there is no definition of vulnerable or intimidated witnesses in civil trials in the same way as is the case for criminal trials,<sup>137</sup> guidance for those professionals engaged in civil trials, during which the receipt of oral testimony will need to be undertaken by witnesses who experience difficulty with communication for a variety of reasons, will need to draw

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<sup>135</sup> Bar Standards Board Handbook version 4.1, July 2019

<sup>136</sup> 'Meeting the needs of vulnerable clients practice note' *The Law Society*, 2 July 2015

<sup>137</sup> Youth Justice and Criminal Evidence Act 1999, section 16

guidance from other comparable sources. Civil Procedure Rule and Practice Direction 21 does recognise protected parties as requiring additional procedural safeguards, but this does not include the manner in which oral testimony is received at trial. Moreover, pursuant to CPR Part 32.2:

‘Evidence of witnesses – general rule

**32.2**

(1) The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved –

(a) at trial, by their oral evidence given in public;’

The requirement that evidence should be given orally and in public emphasises the continuing prevalence of the principle of orality in civil matters. Some softening of the role is afforded by CPR 32.3, which permits the giving of evidence by video link. However, there are no prescribed categories of witness permitted to utilise this provision, and each case would be considered on its merits.

The Advocacy Training Council recognises this lack of provision within civil proceedings in the provision of a guidance toolkit,<sup>138</sup> designed to assist all those practitioners (advocates, solicitors and other representatives and judges) coming into contact with witnesses who plainly are all potentially could be vulnerable. The guide itself acknowledges the difficulty given the lack of formalised provision in the civil trial landscape:

There is clearly a need for more informed support for vulnerable witnesses in the civil justice system, particularly adults who are at risk of being triggered to self-harm, attempt and/or commit suicide either before, during and/or after the legal process.

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<sup>138</sup> ‘Vulnerable Witness and Parties in the Civil Courts Toolkit 17’, Advocacy Training Council, July 2015

There is also a need for the provision of training for advocates, representatives and judges, particularly those who spend comparatively less time in contested hearings.<sup>139</sup>

Civil cases involving vulnerable witnesses and parties plainly do occur, and the effect of the principle of orality combined with the lack of the formal provision of special measures need to be addressed. In *Kimathi and others v Foreign and Commonwealth Office*,<sup>140</sup> some witnesses were unable to travel owing to health and other vulnerabilities. At the case management stage, while the general rule that the witness should give their evidence orally and in public was acknowledged the overriding objective at CPR 1 was also considered in that the court should deal with the case 'justly'.

The pre-eminence the principle of orality can be seen in the Kimathi case:

(i) It is desirable that the Claimants give their evidence in person to the Judge. Video link evidence is not as ideal as having the witness physically present in Court.

(ii) Given the Claimants' personal circumstances, an unfamiliar situation such as video link may possibly affect the cogency of their evidence.

(iii) In an ideal world it would be desirable for the normal trial process to take place within a court room. (The Claimants directed my attention to certain studies in their skeleton argument – though I was not taken to them in oral submissions – as to disadvantages in video link such as apparent reduction in sincerity of a witness, a reduced ability for the Decision Maker to engage emotionally with the witness.)<sup>141</sup>

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<sup>139</sup> *ibid* at page 4

<sup>140</sup> [2016] EWHC 600 (QB)

<sup>141</sup> MR Justice Stewart

## **2.9 Conclusion**

Whereas there are other illustrations concerning European cases and family matters, mainstream civil litigation appears to be bound by the principle of orality, without having evolved a complete strategy to deal with its effects. Chapter 6 of this thesis considers a more radical departure towards an online court and the impact of more innovative, fresh procedures rather than modification as a way forward. The principles of expediency driven by cost and limited court resources are considered above and tie with the issues for consideration in Chapter 3 in relation to experts. This chapter expands the review of the suitability of methods for receipt of oral testimony across both civil and criminal matters.

## CHAPTER 3 - THE ATTITUDE TOWARDS RECEIPT OF EVIDENCE FROM EXPERTS

### 3.1 Introduction

The application of the principle of orality differs dependent on whether the witness in question is attending court to give a factual version of matters perceived (a witness of fact) or to provide an opinion on a matter of expertise outside the normal understanding of the court (an expert witness). Traditionally, the principle of orality whereby the witness attends court in order to provide oral testimony applies equally to witnesses of fact and expert witnesses. However, that principle has been modified significantly both in civil and criminal proceedings.

As is the case with witnesses of fact, the starting point with expert witnesses is the application of the principle of orality and the adherence to the traditional adversarial trial system. The reasons for departure and modification vary dependent on the value and complexity of the case and whether the hearings are of a civil or criminal matter. Notably, movement away from the principle of orality in criminal proceedings tends to follow on from reforms tested within the civil environment. The civil procedure rules have been tested and updated since their introduction following on from the report of Lord Justice Woolf in 1998. While the starting point remains the giving of oral testimony, a movement towards an inquisitorial style with the judge determining how the evidence is adduced can be seen developing through civil proceedings and more recently developing through the criminal procedure rules.<sup>142</sup>

Chapter 3 of this thesis reviews the rationale for a hybrid system stemming from adherence to the principle of orality. The consultation process leading to Lord Woolf's final report fuelled the subsequent rules with only incremental movement away from the principle of orality when the nature of the proceedings required the traditional adversarial

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<sup>142</sup> The Criminal Procedure Rules 2013 No. 1554

process to be modified. It will be argued that had the principle of orality been just one consideration within a procedural pallet then a more appropriate and occasionally more inquisitorial style for receipt of expert evidence could have been developed from the outset without the necessity of an evolution arising out of a difficult starting point.

### **3.2 The Receipt of Expert Evidence in Civil Litigation**

Lord Woolf's report, *Access to Justice*<sup>143</sup> not only brought about a fundamental change to the procedural framework of civil litigation from the perspective of the witness of fact but also those experts providing evidence of opinion. Lord Justice Jackson<sup>144</sup> continued to erode the principle of orality in the far-reaching proposals made to address the costs implications of the use of experts in civil matters. He proposed that the civil procedure rules should be used as a tool to control costs and that the judiciary should implement the provisions to this effect.<sup>145</sup> Lord Justice Jackson focused heavily on the costs likely to be incurred by the use of experts rather than the place experts had previously played in the partisan adversarial trial system. This sought to put the impact of the costs incurred in the use of experts firmly at the fore. The party wishing to adduce expert evidence is now required to provide an estimate of the costs associated with the instruction of an expert in seeking the permission of the court to proceed. In terms of a departure from the principle of orality the revised provisions are a bold move towards judicial control in the inquisitorial style:

Court's power to restrict expert evidence

35.4

(1) No party may call an expert or put in evidence an expert's report without the court's permission.

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<sup>143</sup> *Access to Justice* Lord Woolf, Master of the Rolls Final Report 1996

<sup>144</sup> *The Review of Civil Litigation in England and Wales* R. Jackson 2010

<sup>145</sup> Civil Procedure Rules 35.4(4)

(2) When parties apply for permission they must provide an estimate of the costs of the proposed expert evidence and identify –

(a) the field in which expert evidence is required and the issues which the expert evidence will address; and

(b) where practicable, the name of the proposed expert.

(3) If permission is granted it shall be in relation only to the expert named or the field identified under paragraph (2). The order granting permission may specify the issues which the expert evidence should address.<sup>146</sup>

### **3.3 The Place of Experts in the Litigious Environment**

To appreciate the different approach taken by the civil litigation rules, it is necessary to set into context the different evidential status of expert witnesses.

The whole premise of the principle of orality would appear to be that unless oral testimony is tested in open court, its veracity cannot be acknowledged. However, that test of veracity has been treated very differently in the context of expert evidence. From the outset of the litigation process experts are treated quite differently from witnesses of fact. Expert evidence may only be received if it falls into that category of opinion evidence which allows admissibility for areas of specific technicality. It is this different categorisation of testimony which has led to such a different view of expert evidence with an interesting departure from the principle of orality not seen on the receipt of evidence from witnesses of fact. As with the receipt of evidence on a hearsay basis, the receipt of expert evidence falls under a specific evidential rule which marks this evidence as entirely different. As such the rules governing its receipt have developed separately, and in many ways more appropriately, than a hybrid of the principle of orality seen for other categories of witness. The evidential rule governing the receipt of expert testimony is an exception to the rule against the

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<sup>146</sup> *ibid*

receipt of opinion evidence. This means that disputed questions of fact are determined by the triers of fact (normally a judge alone in civil litigation and magistrates or a jury in criminal litigation) by an assessment of the oral evidence of witnesses together with real or documentary evidence and the drawing of conclusions based on the cumulative weight of that evidence. However, opinion evidence is excluded from those matters which may be considered by the triers of fact, meaning that all witnesses must normally confine themselves to a factual account. The most important exception to this rule against the introduction of evidence of opinion is when the court cannot itself form an opinion owing to the specialist knowledge required to draw a conclusion:

‘Their duty is to furnish the judge... with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge... to form his own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the judge’<sup>147</sup>

In civil litigation the development of the civil procedure rules sought to reduce the partisan nature of the provision of expert evidence to the court and develop a more inquisitorial style for the use of experts. As such, the Civil Procedure Rules place stronger obligation on experts to provide independent evidence to the court rather than evidence which is presented in a way biased towards those who instruct them. This is enshrined in Civil Procedure Rule 35.3:

1. It is the duty of experts to help the court on matters within their expertise.
2. This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

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<sup>147</sup> *Davie v Magistrates of Edinburgh* [1953] SC 34

Another aspect of the use of expert evidence is that, while the civil procedure rules require an independent approach to be taken and for the evidence provided to be primarily of assistance to the court, the privileged nature of the experts report preserves the partisan approach. This is rather at odds with the understanding that the principle of orality may safely be modified on the receipt of expert evidence because the veracity of those experts can more readily be assumed. In fact, given that experts reports remain the subject of legal professional privilege, it is questionable whether the veracity of such opinion evidence can be accepted in a way that witnesses of fact cannot.

The principle of legal professional privilege allows the party who instructs an expert to withhold the content of any report both from the other party to the case and the court. Disclosure and inspection of a privileged document cannot be ordered so long as the party instructing the expert does not intend to rely on it at trial.<sup>148</sup> On the basis that the instructing party does not intend to utilise the expert to support its argument on disputed matters, it may seem that the place of experts in the litigation process as one of independent advisors with the overriding obligation to assist the court remains sound. However, there is nothing to prevent a party sifting through the range of available experts until one is found to support an otherwise unsupported opinion in favour of that party's case. So, while an expert sourced in that way remains under the obligation placed on all experts to assist the court, the selection process has remained secret and protected from view by legal professional privilege. It therefore follows that the assumption the evidence of experts can more readily be relied on ought always to be considered in the context of legal professional privilege which allows parties to hide and disregard previously instructed experts whose opinion does not support their position.

The bringing into effect of such a wide-ranging review of civil litigation by Lord Woolf in 1998 and the subsequent implementation of those reforms set a new landscape for the receipt of expert evidence. The more recent implementation of the reforms brought about by Lord Justice Jackson<sup>149</sup> acknowledged the unsustainable cost of civil litigation. It sought

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<sup>148</sup> Civil Procedure Rule 31.3

<sup>149</sup> The Review of Civil Litigation in England and Wales R. Jackson 2010

to take a radical approach to address this barrier to participation in litigation. Whereas it can be seen that the manner in which oral evidence is received from witnesses of fact has been significantly modified in pursuit of costs reduction, Lord Justice Jackson made more radical proposals in respect of expert evidence in the litigation process. Considering that the starting point in hearing from all witnesses remains the principle of orality, the receipt of evidence from experts has been revised in a way which sees the most significant reconstruction of the traditional Anglo-American adversarial trial system and is perhaps indicative of the possibilities available to move away from the principle of orality to consider something more appropriate as a means by which the triers of facts weigh evidence.

In his report, Lord Justice Jackson identified the prohibitively expensive costs associated with use of experts in the civil litigation forum.<sup>150</sup> As considered above, given the adversarial style of civil litigation and the partisan nature of the instruction of experts, the reality of the production of an objective report is questionable. The subsequent testimony given to the court would be based on that report, and although there is a clear obligation in the civil procedure rules to provide an objective account, the transparency of the process remained questionable. Lord Justice Jackson in his final report did not propose a change to the manner in which expert evidence will be received for all categories of expert but proposed that in appropriate cases a new style of testimony could be considered. This new style of testimony drew on the success of a system used in Australian courts for the receipt of concurrent evidence, and his report proposed the use of a pilot to determine the viability of such a system in the UK.<sup>151</sup>

The technique of receiving concurrent evidence has become known amongst lawyers as 'hot tubbing' and was considered in Australia following on from the U.K.'s consideration of the place for experts going back to Lord Woolf's interim report:<sup>152</sup>

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<sup>150</sup> The Review of Civil Litigation in England and Wales R. Jackson 2010 Chapter 38

<sup>151</sup> *ibid* at p. 384

<sup>152</sup> Lord Woolf MR, access to justice, interim report to the Lord Chancellor of the civil justice system in England and Wales HMSO London 1995 183

expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients.

This problem was equally prevalent in Australia and as such the Australian litigation system sought to address the perceived bias in the use of experts.<sup>153</sup>

An insightful interview was given by New South Wales Supreme Court Judge Peter McClellan to Australian radio network ABC on 5 May 2009.<sup>154</sup> During the interview, Peter McClellan made it clear that his preference was to avoid the term, in common parlance, as 'hot tubbing' but to stick to the more accurate technical description of concurrent evidence. It is clear from the interview that Peter McClellan was concerned with the clarity of evidence received by the judge and the quality of those professionals providing that evidence. Peter McClellan identified a particular problem in those highly qualified in a technical field being unwilling to participate in the adversarial trial process owing to its perceived unfairness and bias. It was considered more likely that high calibre experts would participate if they were given a clear role in guiding the court. A means of achieving this would be by the use of concurrent evidence so that all those experts instructed in the matter could be brought together to assist the court rather than to take a partisan approach.

While this may seem a perfectly common-sense approach, it demonstrates the possibility of radical departures from the principle of orality to achieve a more just procedural approach. The Australian system appeared to be more willing to take a fresh look at how evidence is best received rather than being constrained by traditional ties. The traditional adversarial trial system results in experts giving the testimony on an individual basis and undergoing the normal adversarial process of examination-in-chief, cross-examination and

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<sup>153</sup> Freckleton, P Reddy and H Selby, *Australian judicial perspectives on expert evidence: an empirical study*, Australian Institute of judicial administration, 1999

<sup>154</sup> *ABC* Australian radio network interview given by New South Wales Supreme Court Judge Peter McClellan Tuesday 5<sup>th</sup> May 2009

re-examination. Under the traditional system of the experts instructed in the matter may not be heard some considerable time and will certainly have their evidence entirely separate from those who preceded them in the accepted norm of the adversarial trial. By stark contrast, those giving expert evidence on a concurrent basis can not only engage in open debate and assist one another in the drawing of proper conclusions but may also challenge one another on the spot. This may allow the court to draw a clearer conclusion with the assistance of appropriate technical advice rather than partisan expert opinion:

Experts are not generally trained in assessing adjudicated upon differing views within their discipline. However, that is the expertise of judges and members of courts and tribunal is. They have no baggage. Even expert tribunal members will often only have sufficient expertise to better understand the dispute because their expertise will be related to the discipline generally rather than the particular aspect been placed under the microscope. Expert tribunal members who do fully understand the expert issues will be better able, by training and experience, to put aside any concluded views and take a fresh look.<sup>155</sup>

Such a radical approach to the abandonment of the principle of orality could have far reaching implications if it were to be adopted more broadly in both civil and criminal litigation. The considerable difficulties faced by vulnerable and intimidated witnesses in criminal proceedings will be addressed in Chapters 5 and 6 of this thesis. While the use of concurrent expert evidence currently applies only to specialist civil trials it demonstrates the possibility of moving away from the principle of orality and arguably supports the idea that such radical moves ought to be considered in the criminal forum.

Following on from the Australian experience a pilot utilising concurrent evidence from experts was undertaken in Manchester Chancery Court. A review of this pilot was undertaken by Dame Hazel Jenn<sup>156</sup> and sets out the way in which the Australian experience

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<sup>155</sup> Downes G, concurrent expert evidence in the administrative appeals Tribunal: the New South Wales experience, paper presented at the Australian conference of planning and environmental courts and tribunals Hobart Australia, February 2005

<sup>156</sup> Manchester concurrent evidence pilot interim report Prof Dame Hazel 10 UCL Judicial Institute, January 2012

has been utilised. The way in which evidence was received depended on the particular case and retained the starting point of the preparation of reports on behalf the parties in the normal way. Experts would proceed on the basis of a joint statement summarising matters and identifying areas of disagreement. Following an agreed agenda the experts would appear in court to give sworn evidence concurrently, with the judge participating in a much more inquisitorial style of engagement with the experts to gain insight through more open forum with greater participation from those with specialist knowledge.<sup>157</sup>

A cause of concern in any departure from the principle of orality would be a perception that a completely fresh approach would risk the protection afforded by such a long-established principles. Arguably a fresh approach is what is needed in a whole variety of cases moving through the litigious process. The comfort provided by the system established and the time before living memory is not easy to discard. It would not be sensible to discard a system which is effective and proven but a failure to consider fresh approaches risks continuing with inappropriate techniques for the introduction of evidence. In terms of effective decision-making, the bold departure from the principle of orality in Australia and its subsequent pilot in Manchester appears to have been mixed:

On the question of whether the procedure offered a process that was as rigorous as sequential evidence with traditional cross-examination, views seemed to be more varied and this again reflects a difference of view amongst barristers and solicitors and experts. One judge thought there was little difference between this procedure and the normal approach, while another thought that some elements of the procedure had been more rigorous.<sup>158</sup>

Of particular concern in departing from the principle of orality is the adequacy of any test of veracity. It is largely on this basis that justifications are given for a lack of radical reform in dealing with witnesses of fact. The judge's view from the Manchester pilot was recorded as follows:

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<sup>157</sup> Genn H, 'Getting to the truth: experts and judges in the 'hot tub'', Civil Justice Quarterly Vol 2 issue 2, 2013  
<sup>158</sup> *ibid* at p. 288

The experts are supposed to be objective. Maybe concurrent evidence does improve objectivity because the expert is answering questions put by the judge rather than hostile questions of counsel. I try to keep my questions neutral because I may have formed a provisional view.<sup>159</sup>

The lack of an unequivocal success in any radical departure from the principle of orality does not mean it ought not to be considered. Notwithstanding this, this chapter considers the specific issues arising in respect of expert evidence the issues addressed are transferable to the pressing issues relating to the effect of the principle of orality on those witnesses of fact who are vulnerable. New approaches should be considered and lessons learned. Lord Justice Jackson's review of civil litigation was highly controversial but did attempt a fresh approach:

One of the lessons of the pilot studies is that new procedures take time to settle in. During the early months the inconvenience, stress and muddle of adapting to the changes may make both practitioners and judges questioned the wisdom of the reforms. But that is not the right time to judge the reforms. It is only possible to form a considered view once the changes have been in place for a period and both judges and practitioners have grown accustomed to them.<sup>160</sup>

### **3.4 The Continuing Development of the Use of Experts in the Criminal Procedure Rules**

The provisions of the civil procedure rules governing the use of expert evidence<sup>161</sup> make plain the obligation of the expert to assist the court as a duty overriding the obligation to the party from whom instructions are received. However, issues relating to efficiency and cost are driving change in criminal matters and this affects all aspects of the process, including the use of experts:

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<sup>159</sup> Genn H, 'Getting to the truth: experts and judges in the 'hot tub'' Civil Justice Quarterly Vol 2 issue 2, 2013 p.289

<sup>160</sup> Sir Rupert Jackson foreword Civil Justice Quarterly Vol 2 issue 2 2013

<sup>161</sup> Civil Procedure Rule 31

criminal procedure is becoming increasingly dominated by managerialist concerns. Intolerance to litigant control is motivated by the desire to increase efficiency and reduce cost<sup>162</sup>

The inherent difficulty associated with this having regard to the potential to support those who pay rather than proceed on entirely impartial basis has been considered above. As in civil proceedings, the Criminal Procedure Rules 2013<sup>163</sup> embed an obligation to assist the Court in achieving the overriding objective in the giving of an opinion which is objective, unbiased and reviewed so that on the giving of oral testimony the expert must be providing an up-to-date account having notified to the court of the parties if the opinion set out in the original report has been revised.<sup>164</sup> Despite the embedding of obligations with the criminal procedure rules, the fallibility of the system was recognised resulting in the publication of the Law Commission report *Expert Evidence in Criminal Proceedings in England and Wales*.<sup>165</sup>

A focus of particular concern in the publication of the acknowledgement of the issues relating to the reliability of the expert evidence provided in criminal trials in the current adversarial system with its reliance on the principle of orality. The process of scrutiny undertaken to test witnesses of fact applies equally to experts but given the place of the expert in the decision-making process the reliability of that evidence as the basis for drawing conclusions on technical matters is crucial. The testing of this type of opinion evidence requires scrutiny of the place of the testimony within “a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience”<sup>166</sup> commission in its introduction to the report acknowledges the failures of the principle of orality in cases leading to serious miscarriages of justice. In the cases considered,<sup>167</sup> the failure of the traditional Anglo-American trial system to

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<sup>162</sup> McEwan J, ‘From Adversarialism to Managerialism’ *Legal Studies*, 2011 31(4) 519

<sup>163</sup> SI 2013/1554

<sup>164</sup> R 33.2 the Criminal Procedure Rules 2013

<sup>165</sup> Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales*, Law Com No 325 (2011)

<sup>166</sup> *R. v Bonython* (1984) 38 SASR 45 at [46]

<sup>167</sup> *Dallagher* [2002] EWCA Crim 1903 [2005] 1 CR App R 12, *Clark* [2003] EWCA Crim 1020, *Cannings* [2004] EWCA Crim 1

expose the inadequacies of the expert evidence led to a conviction for murder based on unreliable in a print evidence (Dallagher), grossly misleading statistical evidence resulting in the wrongful conviction of a mother following the death of her infants (Clark) and an inappropriately dogmatic opinion resulting in the subsequently quashed conviction of a mother for the murder of her sons (Cannings):

The commission acknowledged the need for special rules governing expert evidence owing to the particularly privileged position such witnesses hold:

expert witnesses stand in the very privileged position of being able to provide the jury with opinion evidence on matters within their area of expertise outside most juror's knowledge and experience. Moreover, following the demise of the so-called ultimate issue rule, expert witnesses can even provide opinion evidence on the disputed issues the jury have been empanelled to resolve.<sup>168</sup>

The particular issues arising from the traditional Anglo-American trial system with its reliance on the principle of orality and the historical reliance on the principle of orality as the means by which veracity is determined is acknowledged, but not challenged, in the report:

Jury, comprised as it is of laypersons, may not be properly equipped in terms of education or experience to be able to address the reliability of technical or complex expert opinion evidence particular evidence the scientific nature. This being the case, there is a real danger the jury's may simply defer to the opinion of the specialist who has been called to provide expert evidence, or the jury's may focus on perceived pointers to reliability (such as the expert's demeanour or professional status).<sup>169</sup>

The central proposal of the report is a new reliability-based admissibility test for expert opinion evidence. As part of this reliability test the report suggests guidance for exclusion

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<sup>168</sup> Law Commission, Expert Evidence in Criminal Proceedings in England and Wales, Law Com No 325 (2011) at para. 1.14

<sup>169</sup> *ibid* at para 1.15

of expert evidence on the grounds of its lack of sufficient reliability. So here is an example of the revision of the principle of orality. At no point in the report is the fundamental premise that reliance on the principle of orality as the starting point for the receipt of expert evidence, in common with evidence from witnesses of fact, flawed but rather a series of measures to meet its inadequacies is proposed. The difficulties with the law commission proposals, particularly having regard to the ability of the judiciary to determine reliability, are acknowledged:

Even if we leave aside concerns about judicial competence in scientific matters, the Commission's sufficient reliability test seems to require trial judges to undertake a relatively complex task. It involves weighing, among other things, the probative value of the other evidence adduced, the importance of the expert evidence in the context of the case, the extent of scientific research and data supporting the opinion as well as the nature and strength of the opinion that is proffered. The problem with this is that the perceived centrality of an opinion to *the prosecution case* --along with any defence response, such as calling a rebuttal expert--may mediate the rigour of admissibility standards.<sup>170</sup>

The problems associated with receipt of evidence from experts who are paid by one party but who must avoid partisan opinion has been recognised in common law<sup>171</sup> and specifically commented upon in the Law Commission's report. Evidentiary reliability relating to expert opinion evidence must meet a minimum threshold and, while this has been recognised at common law,<sup>172</sup> the Law Commission felt that the reliability requirement in the common law admissibility test was not sufficiently robust<sup>173</sup> and that further statutory guidance would provide an appropriate safeguard. These issues arise from the principle of orality and rather than considering whether it will be appropriate to have an entirely court-appointed system of expert evidence the Law Commission

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<sup>170</sup> Edmond and Roberts the Law Commission's Report on Expert Evidence in Criminal Proceedings [2011] Crim LR 844

<sup>171</sup> *Stubbs* [2006] EWCA Crim 2312

<sup>172</sup> *Dallagher* [2002] EWCA Crim 1903

<sup>173</sup> at para 2.16

restricted itself to modifications of the principle of orality rather than considering a fundamental review of its appropriateness in such circumstances.

The difficulty of the place of experts within the traditional Anglo-American adversarial trial system was considered previously when the Science and Technology Committee of the House of Commons made a proposal in *Forensic Science on Trial*.<sup>174</sup> The suggestion made at the time to utilise specially trained judges sitting without a jury for the most complex matters, while considered as a proposal in the criminal Justice Bill 2002, was only brought into effect for the most complex of fraud matters. Clearly this issue has been long recognised yet reform is piecemeal and hindered by the continuing prevalence of the principle of orality as the linchpin of the system. Arguably a more inquisitorial system, at least in respect of the receipt of expert testimony, would address the issue of disputes between experts and conflicting interpretations of their findings. To some extent the 'hot tubbing' idea of the giving of concurrent evidence by experts would move towards a more inquisitorial style but would not deal with the partisan nature of initial instruction.

In *National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer*<sup>175</sup>

Creswell J provided guidance on the receipt of expert evidence which was summarised as follows:

1. Expert evidence presented to the court should be seen to be the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of advocate.

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<sup>174</sup> *Forensic Science on Trial* – Report of the House of Commons science and technology committee (2004 – 05) HC 96 – 1

<sup>175</sup> [1993] 2 Lloyd's Rep 68 at 81

3. An expert witness should state the facts assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion.
4. Experts should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data are available and this must be stated with an indication that the opinion is no more than a provisional one.
6. If after exchange of reports, an expert witness changes as fuel material matters, such changes or of view should be communicated to the side without delay and when appropriate to the court.<sup>176</sup>

The above guidance seeks to address the inherent issues associated with receipt of expert evidence within the adversarial trial system yet there does not appear to be a more fundamental review to consider the possibility of a more appropriate means for assessing technical matters. In fact, the government's response to Law Commission report Expert Evidence in Criminal Proceedings in England and Wales<sup>177</sup> demonstrates continuing reluctance to address the more pressing issues associated with the legacy of the principle of orality, and a predominantly costs driven response. The Ministry of Justice published a response to the Law Commission's report on 21 November 2013<sup>178</sup> which is notable in its dismissive brevity at 14 pages of the 219 page original Law Commission report. In essence, the government's response was to note the cost associated with a root and branch reform and a preference for a more straightforward and cost effective amendment part 33 of the criminal procedure rules governing the use of expert evidence.<sup>179</sup> Prior to the government's response the efficacy of the far more radical legislative proposals set out in the Law Commission's report was reviewed in Edmond and Roberts The Law Commission's Report on Expert Evidence in Criminal Proceedings [2011] Crim LR 844:

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<sup>176</sup> in *R v Harris* [2006] 1 CR App R 55, CA at 271

<sup>177</sup> *ibid* at 22

<sup>178</sup> The Government's response to the Law Commission's report 'expert evidence in criminal proceedings in England and Wales' (Law Com No 325) November 2013

<sup>179</sup> SI 2013/1554

If the accusatorial trial does not routinely identify and expose problems then practice seems to be substantially displaced from longstanding, and cherished, criminal justice principles. If the limitations with incriminating expert opinion evidence are not identified and explained and fully understood then risks of unfairness and the corruption of proof will be borne by those accused of criminal activity.<sup>180</sup>

No heed appeared to have been taken of these concerns and the principle of orality set within the partisan system continued with only modest updating to the procedural code.

The most recent update of the code applicable to giving of expert testimony in criminal proceedings can be seen in Rule 19 of the Criminal Procedure Rules 2015 and its associated Practice Direction updated in April 2016. The Practice Direction seeks to deal with the reliability associated with the use of experts and provides:<sup>181</sup>

### **Content of expert's report**

**19.4.** Where rule 19.3(3) applies, an expert's report must—

- (a) give details of the expert's qualifications, relevant experience and accreditation;
- (b) give details of any literature or other information which the expert has relied on in making the report;
- (c) contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report, or upon which those opinions are based;

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<sup>180</sup> at p16

<sup>181</sup> paragraph 19 Criminal Practice Directions 2016

- (d) make clear which of the facts stated in the report are within the expert's own knowledge;
- (e) say who carried out any examination, measurement, test or experiment which the expert has used for the report and—
  - (i) give the qualifications, relevant experience and accreditation of that person,
  - (ii) say whether or not the examination, measurement, test or experiment was carried out under the expert's supervision, and
  - (iii) summarise the findings on which the expert relies;
- (f) where there is a range of opinion on the matters dealt with in the report—
  - (i) summarise the range of opinion, and
  - (ii) give reasons for the expert's own opinion;
- (g) if the expert is not able to give an opinion without qualification, state the qualification;
- (h) include such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admissible as evidence;
- (i) contain a summary of the conclusions reached;
- (j) contain a statement that the expert understands an expert's duty to the court, and has complied and will continue to comply with that duty; and
- (k) contain the same declaration of truth as a witness statement.

By the implementation of the 2016 Practice Direction, the Criminal Procedure Rules Committee sought to address the issue relating to the difficulty of reliability concerning expert evidence following the judgement in *R v Dlugosz* and others in which the Court of Appeal acknowledged:<sup>182</sup>

It is essential to recall the principle which is applicable namely determining the issue of admissibility, the court must be satisfied that there is sufficiently

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<sup>182</sup> at paragraph 11

reliable scientific basis for the evidence to be admitted. If there is then the court leaves the opposing views to be tested before the jury.<sup>183</sup>

The Criminal Practice direction goes further to embed the importance of a robust approach to an assessment of reliability. While the importance of assessing reliability has been recognised in cases such as *R v H*<sup>184</sup> in which the need for greater care in the use of experts was acknowledged:

More rigorous approach on the part of advocates and caused the handling of expert evidence.<sup>185</sup>

The 2016 Criminal Practice Direction seeks to acknowledge the concern relating to the reliability of expert witnesses and requires that the court should be 'astute to identifying potential flaws in such opinion which detract from its reliability.'<sup>186</sup> Matters such as the scrutiny placed upon the hypothesis, based on an unjustifiable assumption, the reliance on techniques or methods may be appropriate and improper reliance on an inference or conclusion are embedded in the practice direction to improve reliability. However, the possibility of adopting more radical measures such as the possibility of the use of concurrent expert evidence in a so-called 'hot tubbing'<sup>187</sup> which would more radically address issues of reliability rather than continue to seek to address the inadequacies of the principle of orality and the innate partisan nature of the giving of opinion evidence from those whose expertise is sought from a particular party.

The Criminal Practice Directions: amendment No.8<sup>188</sup> came into force on 1 April 2019 and seeks to allay the disquiet around miscarriages of justice by adding three sections to assist the court and provide clarification to experts as to their disclosure obligations. The

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<sup>183</sup> [2013] EWCA Crim 2

<sup>184</sup> [2014] EWCA Crim 1555

<sup>185</sup> Sir Brian Leveson

<sup>186</sup> Criminal Procedure Practice Direction 19.6

<sup>187</sup> Downes G, concurrent expert evidence in the administrative appeals Tribunal: the New South Wales experience, paper presented at the Australian conference of planning and environmental courts and tribunals Hobart Australia, February 2005

<sup>188</sup> Supplements Criminal Procedure Amendment Rules 2019 SI 2019/143

updated Criminal Practice Direction<sup>189</sup> requires an assessment of key factors as part of determining the reliability of expert opinion. The introduction of the three new sections serves to highlight the extent to which all aspects of the expert's credentials should be considered:

To assist in the assessment described above, CrimPR 19.3(3)(c) requires a party who introduces expert evidence to give notice of anything of which that party is aware which might reasonably be thought capable of undermining the reliability of the expert's opinion, or detracting from the credibility or impartiality of the expert.<sup>190</sup>

The Practice Directions then proceeds to delineate those matters that should be disclosed by the expert:

Examples of matters that should be disclosed pursuant to those rules include (this is not a comprehensive list), both in relation to the expert and in relation to any corporation or other body with which the expert works, as an employee or in any other capacity:

- (a) any fee arrangement under which the amount or payment of the expert's fees is in any way dependent on the outcome of the case (see also the declaration required by paragraph 19B.1 of these directions);
- (b) any conflict of interest of any kind, other than a potential conflict disclosed in the expert's report (see also the declaration required by paragraph 19B.1 of these directions);
- (c) adverse judicial comment;
- (d) any case in which an appeal has been allowed by reason of a deficiency in the expert's evidence;

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<sup>189</sup> Criminal Practice Directions - October 2015 as amended November 2016, April 2017, October 2017, April 2018, October 2018 & April 2019

<sup>190</sup> *ibid* 19A.7

- (e) any adverse finding, disciplinary proceedings or other criticism by a professional, regulatory or registration body or authority, including the Forensic Science Regulator;
- (f) any such adverse finding or disciplinary proceedings against, or other such criticism of, others associated with the corporation or other body with which the expert works which calls into question the quality of that corporation's or body's work generally;
- (g) conviction of a criminal offence in circumstances that suggest:
  - (i) a lack of respect for, or understanding of, the interests of the criminal justice system (for example, perjury; acts perverting or tending to pervert the course of public justice
  - (ii) dishonesty (for example, theft or fraud), or
  - (iii) a lack of personal integrity (for example, corruption or a sexual offence);
- (h) lack of an accreditation or other commitment to prescribed standards where that might be expected;
- (i) a history of failure or poor performance in quality or proficiency assessments;
- (j) a history of lax or inadequate scientific methods;
- (k) a history of failure to observe recognised standards in the expert's area of expertise;
- (l) a history of failure to adhere to the standards expected of an expert witness in the criminal justice system.<sup>191</sup>

The matters listed include serious issues relating to personal or professional conduct and integrity, including of the organisation to which the expert is affiliated.

Shortly before the introduction of these new additions to the practice direction such matters were considered in *R v Pabon*,<sup>192</sup> which centred around the complex issue of

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<sup>191</sup> *ibid* 19A.7

<sup>192</sup> [2018] EWCA Crim 420

LIBOR (The London Inter-Bank Offered Rate) and the question of fraud in relation to those employed at Barclays Bank PLC. An expert (Professor Rowe) was employed and failed on scrutiny by the judge in the giving of evidence:

Put bluntly, Rowe signally failed to comply with his basic duties as an expert. As will already be apparent, he signed declarations of truth and of understanding his disclosure duties, knowing that he had failed to comply with these obligations alternatively, at best, recklessly. He obscured the role Mr O'Kane had played in preparing his report. On the material available to us, he did not inform the SFO, or the Court, of the limits of his expertise. He strayed into areas in his evidence (in particular, STIR trading) when it was beyond his expertise (or, most charitably, at the outer edge of his expertise) – a matter glaringly revealed by his need to consult Ms Biddle, Mr Zapties and Mr Van Overstraeten. In this regard, he was no more than (in Bingham LJ's words) an “enthusiastic amateur”. He flouted the Judge's admonition not to discuss his evidence while he was still in the witness box. We take a grave view of Rowe's conduct; questions of sanction are not for us, so we say no more of sanction but highlight his failings here for the consideration of others.<sup>193</sup>

The failings of this expert would clearly fall into the realms of the newly introduced list above. The question must surely remain that in such circumstances how likely is it that an expert would declare such levels of inadequacy and impropriety. A footnote to the judgment is telling as to the flaws in the use of expert evidence using the traditional system with reliance of the principle of orality to uncover such issues:

The instruction of Rowe turned into an embarrassing debacle for the SFO, all the more so, given the high-profile nature of these cases and notwithstanding that, in the event, it has had no impact on the outcome in this case. We pressed Mr Hines as to whether there was an internal report, dealing with lessons learnt. We subsequently received a helpful letter from the SFO's General Counsel, dated 27th

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<sup>193</sup> The matter came to trial on 22st March 2016 HHJ Leonard QC (the designated trial Judge)

November 2017, stating that there was no such document but that there had been extensive internal discussions resulting in the conclusion “...that Rowe's conduct resulted from a failure of integrity on his part rather than a failure of SFO policies or procedures”. The SFO undertook to look again at the matter to see whether there was any way in which it could reinforce expert witnesses' awareness of their obligations under the Crim PR.<sup>194</sup>

### **3.5 Conclusion**

Following from Chapter 2, issues considered in this chapter demonstrate the absence of a consensus bridging both civil and criminal litigation in terms of policy. Considerable reforms, embedded both in the civil procedure rules and the criminal procedure rules, and associated practice directions go a long way to fixing the issues associated with the principle of orality and the inherent dangers identified within the current system. However, there appears to be no question of challenging the pre-eminence of the principle of orality as the starting point for receipt of evidence from experts but rather to reduce its impact by significant and continuing reform. It is of note that a number of the reforms identified in this thesis affect procedure in both the civil and criminal courts. The use of expert testimony creates similar difficulties across both civil and criminal litigation, but the amendments to procedural rules seek to address particular concerns arising in each. The amendments to civil and criminal litigation are similar but not the same. This in itself creates a more complex structural framework than might be the case if the appropriateness of the principle of orality as the starting point were addressed more fundamentally.

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<sup>194</sup> *R v Pabon* [2018] EWCA Crim 420 para 75 (Gross LJ)

## CHAPTER 4 - THE INTRODUCTION OF SPECIAL MEASURES IN THE CRIMINAL JUSTICE SYSTEM FOR THE RECEIPT OF ORAL TESTIMONY

### 4.1 Introduction

The system of adversarial trials and the principle of orality in the giving of testimony by witnesses is often perceived as a stressful and intimidating experience for adults and a truly traumatising and daunting experience for those witnesses who are vulnerable or intimidated. From the 1980s onwards there has been incremental change acknowledging the almost insurmountable hurdles faced by many witnesses in the process of giving evidence and an acceptance that such hurdles place an unacceptable barrier to those most in need of support and protection.<sup>195</sup>

Lord Devlin's remark that 'the centrepiece of the adversary system is the oral trial'<sup>196</sup> centres on the understanding that the witness should give a factual account from direct knowledge, capable of being tested. The three-stage process for the giving of evidence embedded within the system of criminal justice in an adversarial framework sets out a formalised mechanism for this process. That is the system of testing comprising of evidence-in-chief; cross-examination and re-examination. Each stage of that process would traditionally take place in open court and be the subject of scrutiny by the jury in the Crown Court, the Justices in the Magistrates' Court or the Judge in a civil trial. The question posed is why as a starting point across a variety of litigious forums it is seen as appropriate to achieve fact finding by calling a witness in person and for the witness to be tested by cross-examination, which, by its very nature, is challenging? Clearly, the challenging of disputed evidence must be facilitated. But this perception that the process of questioning witnesses in open court is superior has been open to scrutiny and modification in a variety of processes. It has perhaps caused the greatest difficulty in the

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<sup>195</sup> Pigot, Judge T Report of the Advisory Group on Video Evidence HMSO 1989

<sup>196</sup> Devlin, P *The Judge*, OUP 1979 p.15

criminal trial system when the witness is a child or is otherwise vulnerable or intimidated. By the late 1980s, this system of testing witnesses was questioned 'Alleged superiority of oral testimony is not universally accepted. Like historians, continental jurisdictions prefer documentary sources.'<sup>197</sup>

## 4.2 The Special Measures

An aspect of the principle of orality not considered earlier is the requirement that in order even to have their testimony considered all witnesses must meet a minimum competence threshold. As with other aspects of the principle of orality improvements through reform have been brought about by amendments and adjustments rather than a fresh approach to whether it is the appropriate means by which such matters should be considered. The Youth Justice and Criminal Evidence Act 1999 provides for a much improved approach, and the adjustments made do forge a way through the previous constraints arising from the strict application of the principle of orality. A new test of competence is set out<sup>198</sup> together with provision to accept the unsworn evidence of children under 14<sup>199</sup> and to allow for the receiving of unsworn evidence from adult witnesses who pass the test for competence but who do not satisfy the requirement that they show a sufficient appreciation of the solemnity of the occasion and the particular responsibility to tell the truth which is involved in taking the oath.<sup>200</sup>

Whilst the test of competence is improved and modernised this does nothing to alleviate the impact of the giving of evidence. The experience for numerous witnesses, unfamiliar with the trial system, is both difficult and stressful.<sup>201</sup>

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<sup>197</sup> McEwan, J Documentary Hearsay Evidence-Refuge for the Vulnerable Witness? 1989 Crim LR 629

<sup>198</sup> Youth Justice and Criminal Evidence Act 1999, section 53

<sup>199</sup> Youth Justice and Criminal Evidence Act, section 55

<sup>200</sup> Youth Justice and Criminal Evidence Act, section 56

<sup>201</sup> Ellison L, The adversarial process and the Vulnerable Witness OUP 2001

This aspect of trial process should be borne in mind when considering special measures. It will be considered in more detail in relation to the developing landscape of trials in Chapter 5.

The difficulties faced by vulnerable witnesses derive from the alien nature of the court with the formality of the trial process placing an unacceptable burden. Children in particular face a difficult experience in telling their stories in a court setting with its unfamiliar terms and confusing questioning, even with the assistance of video links and other supportive reforms. This chapter demonstrates the special measures and the resultant modifications to the principle of orality, but even so, the experience remains daunting. The NSPCC researched the experience of child witnesses and concluded “Despite a network of policies and procedures intended to facilitate children’s evidence, only a handful of young witnesses... gave evidence in anything approaching the optimum circumstances. Their experiences revealed a chasm - an implementation gap - between policy objectives and actual delivery around the country.”<sup>202</sup>

Equally, victims of sexual offences face daunting examination of what would normally be private matters. The adversarial system is such that an attack on the credibility of these witnesses is commonplace. Questioning will frequently deal with matters of intense difficulty in suggesting the witness lacks credibility and seek to question the veracity of a witness making deeply distressing allegations.

The principle of orality assumes that all witnesses are capable of speaking up for themselves and standing up to the testing nature of cross-examination. There have been three areas identified as a cause for additional stress for witnesses who have learning disabilities.<sup>203</sup> Such witnesses often are not able to recall as readily as others and may struggle with recounting facts; secondly, these witnesses will frequently find communication hampered and finally the process of cross-examination, with its testing

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<sup>202</sup> Plotnikoff J and Woodson, R In Their Own Words: The experiences of 50 Young Witnesses in Criminal Proceedings 2004

<sup>203</sup> Sanders et al, working with Intimidated Witnesses 2006 Home Office Report

and challenging style, may well result in this category of witness giving answers which are perceived as desirable to please the questioner.

Witnesses who have been subjected to brutality and remain intimidated face hurdles in the giving of testimony in the orthodox style in open court and only the brave may attempt to meet such a challenge.

Early measures to address these clear issues in the administration of criminal justice appeared in the Criminal Justice Act 1988. The provision allowing evidence to be given by live television link<sup>204</sup> for children in cases involving sexual or violent offences was a step in the right direction.

There followed the seminal report of the advisory group, known as the Pigot Report,<sup>205</sup> which sought to address the difficulties faced by children and vulnerable witnesses in the trial process. Right from the outset, the clear problem of ensuring the defendant had a continued right to test evidence through cross-examination proved an obstacle. The advisory group considered the methods available to deal with such cases swiftly and to do so in such a way as to keep the child witness away from the formality of the courtroom where appropriate. The recommendations arising from the Pigot report included provision that in cases involving sex or violence evidence should be given by way of a television link and that the first stage of the process, evidence-in-chief, should be pre-recorded. It was also envisaged that cross-examination should be conducted away from the court setting resulting in the removal of the need for a child to appear in court. However, these recommendations were not fully implemented with only a partial introduction of the recommendations in the Criminal Justice Act 1991.<sup>206</sup> The reasons for a lack of full implementation can be seen as a continuing undermining of the reforms and serves to

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<sup>204</sup> Criminal Justice Act 1988 section 32

<sup>205</sup> Pigot, Judge T Report of the Advisory Group on Video Evidence HMSO 1989

<sup>206</sup> Spencer, 'Evidence and Cross-Examination' in La Rooy, Malloy, Katz and Lamb (eds), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* 2011; Spencer and Lamb, *Children and cross-examination: Time to change the rules* 2012

highlight the impact of starting the process with the principle of orality rather than taking a bold approach to a more appropriate system:

However, in 1990, the government adopted the "half-Pigot" scheme, which permitted the pre-recording of the evidence-in-chief but not the cross-examination. Forensic interviews were to be conducted in accordance with detailed guidance laid out in the Memorandum of Good Practice for Video-recorded Interviews,<sup>12</sup> which was later replaced by the Achieving Best Evidence (ABE) Guidance.<sup>13</sup> These video-recordings were to be played as the evidence-in-chief if trials ensued, but children were still required to appear at trial to be cross-examined. Parliament later authorised pre-trial cross-examination as a special measure in s.28 of the Youth Justice and Criminal Evidence Act in 1999, but implementation was suspended due to concerns regarding the required procedural changes, the available technology, the cost, the rights of the defendant, and the possible need to recall child witnesses when further information became available.<sup>207</sup>

Although the legislation now afforded the opportunity of pre-recorded evidence-in-chief much of the Pigot report remained to be addressed.

The failure of the legislation to implement key recommendations was considered by a member of the Pigot Group Jenifer Tempkin. Her concerns centred on the considered view of the Pigot Committee that the child should, insofar as possible, be kept away from the court in criminal proceedings. The Pigot group expressed the view that children should give evidence at a preliminary stage in circumstances where they could feel comfortable with only the judge and advocates for each party present. The lack of preliminary hearings in the measures brought forward was met with a considerable degree of concern:

The Government's rejection of the idea of the preliminary hearing has been greeted with dismay by psychiatrists, social workers, police and crown prosecutors who

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<sup>207</sup> Henderson H and Lamb M Pre-recording children's trial testimony: effects on case progression 2017 *Crim. L.R.* 345

regularly deal with child abuse cases. Child witnesses in sexual abuse trials are all too often put through the mill and doubly traumatised.<sup>208</sup>

The continued concerns in the inadequacies of the system were recognised, and a Home Office interdepartmental working group was set up in 1997. The group honoured a manifesto pledge of the new Labour administration to protect vulnerable witnesses and enable them to achieve the best evidence in court proceedings. This group went on to publish its report 'Speaking Up for Justice' by the summer of 1988.<sup>209</sup> The membership of the group was drawn from a wide range of disciplines including, inter-alia, the Crown Prosecution Service, the Home Office and Victim Support groups. The group's total of 78 recommendations resulted in the measures set out to address the needs of children and other vulnerable and intimidated witnesses in Part II of the Youth Justice and Criminal Evidence Act 1999. In particular the complex, and rather unwieldy, regime of special measures sought to deal with the main recommendations arising from the Speaking up for Justice Report and brought about the most radical reforms to date in the developments towards a system of criminal justice which recognises the need to support those witnesses who are capable of providing good evidence but are severely impeded by a range of difficulties in testifying.

While the YJCEA 1999 received royal assent in July 1999, many of the measures were to be brought in through a phased programme of implementation.<sup>210</sup> The practical reality of embedding a system in a consistent and reliable manner has been the subject of continuing concern and remains under review.

A range of measures designed to address the 78 recommendations set out in the Speaking Up for Justice Report<sup>211</sup> were enacted in Part II of the Youth Justice and Criminal Evidence Act 1999. These measures herald a new era of a more comprehensive and systematic provision of support and appropriate treatment for children and other vulnerable or

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<sup>208</sup> Tempkin J, 'Doing Justice to Children' 141 NLJ 315 1991

<sup>209</sup> Speaking up for Justice, Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated witnesses in the Criminal Justice System, Home Office 1988

<sup>210</sup> Home Office Online Report 01/06

<sup>211</sup> Home Office 1988

intimidated witnesses. However, the initial simplicity in the categorisation of witnesses entitled to a special measures direction belies the complexity of the detail in the application of the procedures. The provisions allow for a departure from the traditional trial procedure and modify how certain witnesses will provide testimony to the court.

Royal Assent was granted in 1999 and the programme of implementation rolled out across both Magistrates' and Crown Courts. The Act covers a wide range of matters including the definition of a vulnerable or intimidated witness; a test for those eligible; the spectrum of special measures to provide a supportive environment in which testimony can be given; special recognition of the child as a witness; an absolute prohibition on the cross-examination of complainants in sexual cases and prescribed child witnesses by the defendant and a discretionary prohibition in other cases; limitations on the questioning of victims of sexual offences about sexual history and restrictions on press coverage. The Act also introduces a new test for competence, providing a different emphasis in the attitude towards the level of sophistication required before a witness is regarded as capable of providing testimony.

While these provisions appear laudable in meeting the majority of the recommendations of the Speaking Up for Justice Report, they are seen as lacking in four major respects.<sup>212</sup> The regime introduced is regarded by commentators as unnecessary in its level of complexity. Secondly, the distinction made between those children giving testimony in sexual offence cases and those involved in offences of physical violence is seen as crude and inflexible. Thirdly, the failure to bring in the provision allowing for cross-examination to be pre-recorded<sup>213</sup> thwarts one of the main objectives of the Pigot Report, which was to keep the child away from the court and is referred to as the 'half Pigot'.<sup>214</sup> Fourthly, more could have been achieved in the bringing in of the YJCEA to ensure witnesses in need of special measures were identified and assessed and that all initial interviews were recorded in a suitable friendly environment as a matter of course. This, together with

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<sup>212</sup> Keane *The Modern Law of Evidence* 2014

<sup>213</sup> Youth Justice and Criminal Evidence Act 1999 section 28

<sup>214</sup> Pigot *Unfulfilled: Video recorded cross-examination under section 28 of the Youth Justice and Criminal Evidence Act 1999* 2005 *Crim LR* 456

tighter controls on those advocates using the trial process to trick the witness with difficult and inappropriate questioning,<sup>215</sup> would have met the objectives set out by Pigot at a much earlier stage. It can be seen that Pigot sought to move away from the principle of orality, but ultimately the reforms that were to follow have been caught up by its constraints.

To consider the burden of the principle of orality within the reforms, it is necessary to look at the regime that was implemented to overcome its worst effects. A starting point is to identify whether the witness is vulnerable or intimidated as set out in sections 16 and 17 of the Act.<sup>216</sup>

A vulnerable witness is defined at section 16 as one who is under 18 years old<sup>217</sup> or a person whose evidence is likely to be of diminished quality arising from a mental disorder or a significant impairment of intelligence and social functioning or a physical disability or disorder. In determining the extent to which a witness suffers from a physical disability or is suffering from a physical disorder, consideration will be given by the court to the views expressed by the witness.

Section 16 refers to the quality of the evidence, and this is to be considered in terms of its completeness; coherence and accuracy. Coherence is assessed by reference to the ability the witness displays in testifying and the giving of answers which address the questions asked and which are capable of being understood.

Section 17 defines an intimidated witness as one in respect of whom the court is satisfied that the quality of evidence given by the witness is likely to be diminished because of fear or distress on the part of the witness in connection with testifying in the proceedings.

To determine if a witness comes within section 17, the court takes account of the nature and alleged circumstances of the offence in question and the age of the witnesses. Account

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<sup>215</sup> Plotnikoff and Woolfson 'Cross-examining children - testing not trickery' (2010) Archbold Review

<sup>216</sup> Achieving Best Evidence Crown Prosecution Service Guidance March 2011

<sup>217</sup> Amended by the Coroners and Justice Act 2009

is also taken of other matters which appear to the court to be relevant, which are social and cultural background and ethnicity; circumstances relating to employment and domestic circumstances; religion and politics and notably the attitude of the accused towards the victim or the behaviour of anyone associated with the accused. The witness is entitled to have his or her opinion taken into account. Automatic eligibility is given to witnesses who are also victims of sexual offences although the victim remains entitled to decline special measures. Section 17(5) is an addition made by the Coroners and Justice Act 2009<sup>218</sup> allowing for similar provision, with an opt out at the request of the witness, for automatic eligibility where the offence is specified as a relevant offence relating to offences involving the use of guns or knives.

If any of the criteria in sections 16 or 17 are satisfied, it follows that the witness can be the subject of a special measures direction.

Once a determination has been made in respect of the criteria for consideration in sections 16 and 17, the court must then have regard to the eligibility criteria set out in section 19. On the application of the party calling the witness, or of its own motion, the court may make an order if it considers that a special measure or combination of special measures would be likely to improve the quality of the evidence given by the witness. The task then falls to the court to determine which single measure or combination of measures would best serve the interests of allowing the witness to give evidence in a manner acceptable to the needs of that witness. The court will need to consider how to obtain the best evidence in all the circumstances taking account of the views of the witness but also having regard to the extent to which the measures reduce the testing of that evidence.<sup>219</sup> While the court has discretion in deciding on whether special measures may serve to improve the likely quality of the evidence, having reached that decision, there is no remaining discretion, and the appropriate order must then be made. Once in place, the special measures will apply throughout the proceedings.<sup>220</sup>

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<sup>218</sup> at s99(2)

<sup>219</sup> Youth Justice and Criminal Evidence Act 1999 s19 (3)

<sup>220</sup> Youth Justice and Criminal Evidence Act 1999 s20 (1)

There are eight special measures set out in the Youth Justice and Criminal Evidence Act each with its own, sometimes almost impenetrable, criteria which must be considered in conjunction with any issues relating to eligibility.

Looking at the measures in turn and in particular considering the impact of the principle of orality.

The provision of screens to shield the witness is set out in section 23. This measure reduces the obvious stress associated with the witness faced with confronting the accused. The stress inherent in confrontation generally is sufficiently difficult and for that confrontation to take place in the formal and alien surroundings of the court serves to make the situation worse. Having regard to the special considerations applying to child witnesses, it is unlikely that the special measure of a screen will feature to any significant extent. However, its place in the range of special measures demonstrates the particular issues arising in the assumption that giving evidence in open court is the starting point from which the process incrementally withdraws. It may have limited application in those situations where the child has indicated a preference to give evidence in open court, and this measure is considered a suitable alternative to the live TV link. More likely, this measure will be used in situations where adult witnesses have been assessed as eligible for special measures. The screen should be erected in such a way as to allow the participants in the trial process, other than the accused, to view the witness. The purpose of the screen is to facilitate the giving of evidence and not to prevent its evaluation by the judge, jury and advocates. It is a shield for the vulnerable rather than a device to avoid scrutiny. The question is why such a shield for the vulnerable is necessary and whether a re-evaluation of the system at a more fundamental level is the issue.

Evidence by live link is set out in section 24. The concept of remote evidence via a live TV link was one of the earliest measures to become available in previous legislation.<sup>221</sup> The

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<sup>221</sup> Criminal Justice Act 1988 s32

link is set up to facilitate the giving of evidence during a live trial so that, while the witness is within the precincts of the court and the giving of evidence is contemporaneous with the proceedings, the environment is less intimidating, and the austere nature of the court layout avoided. Having regard to the primary rule that child witnesses give evidence outside the courtroom,<sup>222</sup> it will be only in exceptional circumstances that the child will be brought to face the giving of evidence in open court. The view expressed that giving evidence in open court should be considered the norm for witnesses<sup>223</sup> has been superseded by the special measures now in place as the standard default position for the eligible vulnerable witness. However, that 'norm' rather than having been replaced has again been modified.

A new section 33A<sup>224</sup> allows for the use of a link for defendants under 18 and those over 18 affected by a mental disorder. The conditions for the use of links for an accused in this way has been mirrored to a large extent by the new section 33B which allows the use of intermediaries as a special measure to assist certain defendants.

Evidence in private (clearing the court in sexual cases or where there has been or may be intimidation) is set out in section 25. This provision allows for the court to allow only those participants necessary in the trial process to remain and the normal open court arrangement to be restricted. This means that only the defendant together with the judge; jury; legal representatives; interpreter or assistant (where appropriate) and limited media would be permitted. The departure from the normal open court arrangement would be for the duration of the evidence provided by the witness in respect of whom this special measure is made. Given this approach of clearing the court is a departure from the normal principle of open justice and enshrined as a right within the ECHR its use is limited so as not to infringe the right to a fair trial.<sup>225</sup> The provision is therefore available for the trial of sexual offences or where intimidation of the witness has or may occur.

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<sup>222</sup> Youth Justice and Criminal Evidence Act 1999

<sup>223</sup> *R. v. Redbridge Youth Court Ex. P. DPP* [2001] 4 All ER 411

<sup>224</sup> Inserted by Police and Justice Act 2006 s47

<sup>225</sup> Art 6(1)

Removal of wigs and gowns is set out in section 26. This measure has long been available within the inherent jurisdiction of the court and is now set out on a statutory footing. It has no record of controversy in its use. There is little or no scope to argue its implementation will infringe the right to a fair trial. It is a minimal approach to reducing the formality of the court setting to set an eligible witness at greater ease. The removal of wigs and gowns does little more than to change the tone of the proceedings and assist in removing aspects of austerity and solemnity, which may unsettle the vulnerable witness.

Video recorded evidence-in-chief is set out in section 27. s32A of the Criminal Justice Act 1988 as inserted by s54 Criminal Justice Act 1991 provided the original statutory basis for the introduction of this flagship of special measures. Initially limited to child witnesses, it was extended to all criminal proceedings and all eligible witnesses. Perhaps more than any other, this provision changed the landscape in departing, for the first time, from the orthodox trial process in allowing some of the evidence to be video recorded in advance and delivered without the witness being in the courtroom. A plethora of technical difficulties soon became apparent in gathering evidence in this manner. An early 'memorandum of good practice' provided guidance and has now been updated to provide detailed and comprehensive coverage of the various issues to be addressed. While a non-statutory code, the memorandum is accepted as the normal standard in the way in which this evidence is prepared. The guidance, updated in 2011, *Achieving Best Evidence in Criminal Proceedings*, is published by the Crown Prosecution Service. The video recorded evidence serves to replace the examination-in-chief of the witness and stands as evidence of its content in exactly the way that live direct testimony would.<sup>226</sup> Given the nature of showing evidence which is not contemporaneous with the proceedings, power exists to limit its use in the interests of justice.<sup>227</sup> The collection of oral testimony away from the normal intervention from the opponent's legal representative and the judge may well result in the inclusion of a range of otherwise inadmissible matters. There is nothing in the advance recording of evidence-in-chief which removes the normal considerations of prejudice to the accused by references to otherwise inadmissible material, such as bad

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<sup>226</sup> s31 (1)-(4)

<sup>227</sup> s27 (2)

character. The very nature of evidence from a vulnerable witness is such that some prejudicial material is likely to be included and the decision as to whether to use the recording, in whole or in part, will be determined by reference to the interests of justice. It is a question of balancing the probative value against the risk of prejudice to the accused. The manner in which the recording was obtained, such as the avoidance of leading questions as detailed in the guidance on achieving best evidence, will be considered in determining that balance.

The test for the admissibility of the video-recorded evidence was whether a reasonable jury properly directed could be sure that the witness had given a credible and accurate account on the videotape, notwithstanding any breaches of the guidelines. The reliability of the evidence would normally be assessed by reference to the interview itself, the conditions under which it had been held, the age of the child, and the nature and extent of any breach of the guidelines.<sup>228</sup>

An additional consideration created by collecting evidence in this pre-recorded format is the preparation of a transcript and the use that may be made of that document during the proceedings. 'Achieving Best Evidence' (the guidance) sets out the process for the preparation of a transcript and the various uses to which it may be put both in preparation for and during the proceedings. The transcript may be an exhibit or may replace the normal full witness statement. In whatever form it appears the witness may refer to it prior to attending court for cross-examination via a live TV link. To do otherwise would be to treat the vulnerable witness in a way less favourable than other witnesses who can read their earlier statements before giving oral testimony.<sup>229</sup> A more controversial aspect is whether the jury or justices should be allowed to have copies of the transcript while watching the video recorded examination-in-chief. The technical difficulties in obtaining clearly audible testimony from a young child or an otherwise vulnerable witness are apparent and recognised in the guidance. As such, the transcript would obviously be of assistance to the jury in ensuring correct interpretation of the evidence and ensuring the best evidence is

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<sup>228</sup> *R v K* [2006] EWCA

<sup>229</sup> *R v Richardson* [1971] 2 QB 484

received in a situation where the witness cannot be asked to speak up or repeat a point, as would be the case with live oral testimony given during the trial. However, given the jury see the evidence presented in a different format by comparison with other witnesses of fact then it is important a judicial direction is given to the effect that the evidence is the content of the video clip and not the transcript itself. A failure in this regard may well result in a successful appeal:

that although the judge could not be criticized for having permitted the jury to see the video evidence, he had failed to give them any warning about the risks of attaching undue weight to the transcript of that evidence<sup>230</sup>

A more difficult point is whether it may be permissible to allow the recording to be viewed more than once. This would be a significant departure from live oral testimony when it would be very unlikely that a witness is recalled to give evidence more than once. Even if that were to be the case, it would relate to a new issue rather than a reiteration of previous testimony. It is clear that a second viewing should only be allowed exceptionally<sup>231</sup> and in the presence of the judge and advocates with an appropriate warning as to its weight (above).

Another important argument was in relation to the right to a fair trial under Article 6 ECHR. This matter was settled in *R. (on the application of D) v Camberwell Green Youth Court* [2005]<sup>232</sup> when the issue was considered and determined clearly in favour of the use of pre-recorded testimony.

Video recorded cross-examination or re-examination is set out in section 28. The thrust of the Pigot report was to keep children away from the court and to have the whole of the process of giving oral testimony pre-recorded. This would represent the most striking and radical departure from the principle of orality. In that way, the stress of the proceedings

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<sup>230</sup> *R. v Springer (Ernest John)* [1996] Crim. L.R. 903

<sup>231</sup> *R v. M* [1996] 2 CrApp.R. 56 CA.

<sup>232</sup> [2005] UKHL 4

could be minimised and the evidence in its entirety available in advance. The enactment of section 28 would appear to complete the process in accommodating the 'full Pigot'. The completion of the three-stage process of oral testimony would be in accordance with the requirement that cross-examination and re-examination would be with the legal representative and the judge, but not the accused, present and able to communicate with the makers of the recording. The accused, whilst not present at the recording, would be able to observe the cross-examination and to communicate with legal representatives. Similarly to examination-in-chief the recording would stand as direct oral testimony, and no further questions would be allowed without additional directions. In this way, the witness need not be present at all during the trial. The right to a fair trial is not infringed in that the accused has the opportunity to test the evidence. It has been established in *R. (on the application of D) v Camberwell Green Youth Court* [2005] that there is no right to physical confrontation in the right to a fair trial under Art. 6 of the ECHR. The sticking point with section 28 is its lack of implementation with decades passing from its initial proposal with no real prospect of it becoming normal practice in trials. There were, however, initial pilot studies<sup>233</sup> followed by an expansion with effect from 3 June 2019.<sup>234</sup> It remains to be seen if this very radical departure from the principle of orality, having been waiting in the wings for more than two decades, will eventually be established as a norm.

Examination of witness through an intermediary is set out in section 29. The concept that those for whom English is not a first language and therefore require the assistance of an interpreter in the giving of oral testimony has long been accepted practice. However, the idea of the intermediary as introduced in section 29 was an innovation serving an entirely different purpose in the facilitation of the giving of evidence by children and other vulnerable witnesses defined under section 16. The innovative aspect is that this type of intermediary will be able to interpret the questions and answers in the situation where the narrower function of the interpreter to translate literally does not allow for effective communication. The judge and the jury must be able to see and hear the intermediary (with the exception of pre-recorded examination-in-chief) as must the legal

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<sup>233</sup> Section 28 Pilot HM courts and tribunal's service 28<sup>th</sup> of July 2014

<sup>234</sup> The Youth Justice and Criminal Evidence Act 1999 (Commencement No.16) Order 2019

representatives. It is argued that by providing a conduit between the witness and the court, the intermediary facilitates the giving of testimony by allowing more effective communication.<sup>235</sup>

The Youth Justice and Criminal Evidence Act has an extension of this provision<sup>236</sup> in s33BA to enable this measure to be used to assist the giving of testimony by defendants under 18 and adults whose level of social functioning or intellectual impairment or mental disorder (within the meaning of the Mental Health Act 1983) and when the use of an intermediary is in the interests of justice. For those defendants under the age of 18, the court must determine that the giving of evidence will be compromised and that the use of an intermediary will allow for more effective participation. The court gives reasons for its decision whether to make a direction under s33BA and must be satisfied that an intermediary is required to meet the right of the defendant to receive a fair trial.

Aids to communication are set out in section 30. A witness eligible to receive assistance by way of a special measures direction under s16, who is vulnerable, rather than intimidated, may be provided with a device to assist in communication. It may be that the ability to express through speech, for example, following a stroke, does not allow the witness to give the evidence through the normal means of oral communication. The witness in that situation may be able to give high quality evidence expressed through an aid to communication such as a specially prepared book allowing the witness to point to a symbol or answer from a selection available. This means that any disability or other impairment should not prevent the witness giving evidence (either in the court or elsewhere) when an aid to communication can be provided to assist in overcoming the obstacle the witness encounters in communicating orally.

Intermediaries and communication aids are only available for vulnerable witnesses within the meaning of s16. However, the normal rules concerning foreign language interpreters and those providing signing for the deaf remain as before. As such, the special measures

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<sup>235</sup> Crosse examination and the Intermediary: Bridging the language divide? 2002 Crim LR 114

<sup>236</sup> as inserted by Coroners and Justice Act 2009 s104

in ss29-30 serve to enhance the normal provisions for those eligible while leaving the provisions for other witnesses intact.

In respect of a child witness, the eligibility criteria must be considered with additional considerations set out in section 21. The child must normally be given a special measures direction allowing for evidence-in-chief to be pre-recorded and for cross-examination and re-examination to be via a live television link.<sup>237</sup> This is known as the primary rule. If the court considers that compliance with this would not be likely to maximise the quality of the evidence of the child or the child has requested this does not apply consideration will be given to other special measures which may be appropriate and acceptable to the child. This may be appropriate where the child is a teenager, and the court is satisfied that giving evidence in open court will not diminish the quality of the evidence having regard to a range of factors including age; maturity; any relationship with the accused and cultural and social issues. In this situation a screen would normally be considered an appropriate alternative.

Other measures introduced to compliment the special measures and facilitate the giving of evidence by witnesses for whom the traditional open court principle of orality is unacceptable demonstrate the extent to which, together with the range of special measures considered above, the current trend to modify and adjust the standard format for the receipt of evidence tinkers with a formula when a more radical review of the suitability of the system, with its origins from the time of Henry II, is required to meet the needs of current day fact finding.

Section 41 of the Youth Justice and Criminal Evidence Act implemented reforms to the much criticised<sup>238</sup> provisions restricting the questioning of victims of sexual offences found at common law and latterly in s 2 of the Sexual Offence (Amendment) Act 1976. The starting point is the recognition that questioning regarding sexual behaviour is not

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<sup>237</sup> as amended by the Coroners and Justice Act 2009 s100

<sup>238</sup> Speaking up for Justice Report of the CJS group 1999

considered acceptable, and the general ban on such questioning or evidence within the legislation is set out in s41(1).

This general ban must not infringe the defendant's right to a fair trial and thus contravene art.6 of the ECHR. It follows that the ban is general, rather than absolute, with tight limitations placed on exceptions. The accused is still able to ask questions (via a legal representative) and adduce evidence relating to the event in question. Otherwise leave may be given to pursue matters relating to sexual behaviour only if the conditions set out in s41(2) are met. These conditions are very limited and apply where otherwise any conviction may be unsafe. This departure from the standard procedure for cross-examination again highlights a hybrid version of the principle of orality within a system of special measures already providing for a modified system. Surely taking a fresh starting point to the evaluation of the best means by which such sensitive matters may be determined is more logical and appropriate than continuing to amend a system plainly unsuited to such proceedings.

The court's inherent jurisdiction was stretched to the limit in a notorious case<sup>239</sup> during which the accused subjected his victim on an allegation of rape to hours of personal cross-examination while dressed as he was when the alleged offence occurred. The humiliating and abusive nature of such an event is apparent and could not be allowed to stand unaddressed. The Court of Appeal in the case indicated it would be unlikely to interfere with the decision of a judge to limit such grotesque abuse of the complainant and section 35 followed to set a prohibition on such questioning in a statutory framework.

Section 34 is an absolute prohibition on the accused personally carrying out cross-examination of the complainant. Complimentary provisions are set out in section 35, imposing a similar prohibition in respect of child witnesses in a wider range of offences. Section 36 allows for a prosecution application (or the court may consider this of its own motion) to prohibit questioning by the accused personally in circumstances outside the

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<sup>239</sup> *Brown (Milton)* [1998] 2 Cr.App.R 364

scope of ss34-35 where such questioning by the accused in person is likely to diminish the quality of testimony. There is a familiar interests of justice test to be applied in balancing the quality of the evidence against the right to a fair trial for the accused. As regards a fair trial, it is essential that the accused should be given the right to test the evidence and may refuse to accept legal representation. To meet this eventuality, the court has power in section 38 to appoint a representative to be paid from central funds and without the normal responsibility to the accused. The final aspect of these provisions is in section 39, which provides for a warning in indictable offences so that the judge will direct the jury that no prejudicial inference should be drawn from these arrangements.

The Youth Justice and Criminal Evidence Act 1999 forms the basis of the provisions, and subsequent legislation contains important measures in facilitating the oral testimony of vulnerable or intimidated witnesses.

One of the more notable provisions relates to witness anonymity. Given the factors leading to the designation of a witness as intimidated within the 1999 Act, it is clear that on occasion there will be a strong argument for anonymity. It has long been possible to give evidence in a hearsay format with more recent provision in the Criminal Justice Act 2003<sup>240</sup> to accommodate those in fear. However, this does not meet the need of the more serious incidents of witness intimidation arising, for example, in cases of organised violent crime. Another consideration is that if a statement is used in a hearsay format, the court is deprived of the opportunity of hearing the oral testimony and the accused of the opportunity to test that evidence through cross-examination. In addition the use of a statement does not protect the accused from threats and possible violence away from the court setting.

Until the case of *R v Davis*,<sup>241</sup> it was assumed that the inherent power of the court to adjust the format of the trial would suffice. Davis brought this practice in respect of witness anonymity to an abrupt end. The House of Lords decided that the anonymity afforded to

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<sup>240</sup> s116

<sup>241</sup> [2008] 3 All ER 461

the defence witness in Davis did not allow a fair trial and breached art 6 of the ECHR. The speedy response to this decision by the government resulted in The Criminal Evidence Witness Anonymity Act 2008. Given the hasty nature of the legislation, it contained a sunset clause<sup>242</sup> which would result in its automatic repeal unless extended. The Coroners and Justice Act 2009 superseded the 2008 Act and provided almost identical replacement provisions. The replacement provisions came into force on 1<sup>st</sup> January 2010. The use of anonymity orders will be sparing and governed by provisions setting out parameters for their use. In this regard Guidance to Crown Prosecutors<sup>243</sup> recognises the need to have regard to the decision of the Court of Appeal *R v Mayers*.<sup>244</sup> It is a very significant departure from the norms of the trial process to allow a witness anonymity and very strict considerations both in terms of the application and the disclosure obligations apply. The court must take account of the normal right of the accused to know the identity of the witness and to be able to test the evidence. This, of course, emanates from the traditional Anglo-American trial system. Clearly, if credibility is an issue, the identity of the witness is crucial in allowing for effective cross-examination. It will therefore be vital to identify the difference between arguments relating to reliability and those genuinely grounded on issues of credibility.

Another very significant consideration in determining an application is the extent to which the witness is the sole or determining evidence in the prosecution case. In those situations, the difficulty in conducting an effective defence in the face of an anonymity order should be taken into account. Consideration must also be given to factors relating to the potential dishonesty of the witness and any relationship between the witness and the accused or the accused's associates. Having regard to the deprivation of the accused of the normal information relating to witness identity disclosure on the part of the prosecution must be full and enable the arguments to be properly considered by the defence. At trial, the judge must warn the jury against drawing any prejudicial inference against the defendant based on the anonymised testimony. In the words of the Director of Public Prosecutions:

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<sup>242</sup> at s114

<sup>243</sup> The Director's Guidance on Witness Anonymity CPS 2009

<sup>244</sup> [2008] EWCA Crim 1418

the use of an anonymous witness should only be considered where it is justified under the 2009 Act and where such a course is consistent with a fair trial. Applications should be made only in those cases where it is absolutely necessary.<sup>245</sup>

A question remaining following the significant reforms considered was the admission of video recorded examination-in-chief for witnesses falling outside the scope of the 1999 Act. The Auld review<sup>246</sup> considered a broad range of issues in the operation of the courts amongst which was the use of video recorded examination-in-chief for those witnesses to serious crimes on similar lines to s27 of the YJCEA 1999. The hope was to reduce the stress for these witnesses in a way already demonstrated by a special measures direction under s27 and to preserve evidence at a time when it was much more likely to be accurately recalled. As with s27 concerns regarding the leading of witnesses in gathering evidence in this format were considered and met with similar arguments, that is guidance on the recording process and the fact that any leading would be obvious on viewing. Clearly, witnesses entitled to measures under section 27 may also fall within this proposal and in such circumstances would be dealt with under established provisions. This recommendation from Lord Justice Auld's review found its way into the Criminal Justice Act 2003 at s137. However, s137 is yet to be brought into force, and there is no proposed timeframe for its introduction. If in force, it would enable the court to make a direction that the witness to an offence triable only on indictment or a prescribed either way offence could give evidence-in-chief through a video-taped account. The account would have to be at a time when events were fresh in the memory and, as with a special measures direction under s27 of the 1999 Act, would stand in place of direct oral testimony. A number of matters to assure the fairness of the use of such evidence are set out in the legislation,<sup>247</sup> such as the time between the event and the account given; reliability of the witness and the quality of the recording. Account must also be taken of the risk of prejudice to the

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<sup>245</sup> Keir Starmer QC DPP Witness Anonymity CPS (The Director's Guidance) December 2009

<sup>246</sup> Review of the Criminal Court in England and Wales 11<sup>th</sup> Report (cmd 4991)

<sup>247</sup> at ss137(4) and 138

accused and considerations relating to the overall interests of justice in the use of pre-recorded testimony.

The special measures introduced under the YJCEA brought a range of features to enhance the experience of vulnerable and intimidated witnesses on a previously unseen scale. However, while there can be no doubt the special measures introduced went a long way towards achieving a better landscape in the adversarial process, equally, there is no doubt that difficulties were soon identified. Initial reaction to the reforms proved a cautious welcome. As far back as 1991,<sup>248</sup> Professor Jennifer Tempkin, a member of the Pigot Committee, commented on the progress made towards achieving the central recommendations arising from the report of the Pigot Advisory Group.

The real ambition of the report was, in so far as possible, to keep the child away from that part of the adversarial process conducted within the precincts of the court. The idea that all the evidence could be considered at an early stage without the presence of either the jury or any press reporting was the recommendation and aim of the group. The hope was that all the information that needed to be considered at such a preliminary hearing could be obtained in a way which would feel very different from the conventional courtroom experience. The surroundings for such a hearing, it was hoped, would be more comfortable and homely in style with none of the intimidating formality of the court setting. Those present would be limited to the judge, advocates for each side and a supporter for the child. It was proposed that the defendant would not be excluded but be able to view the process through a video link and be able to communicate with his counsel via an audio link. All that was captured in the video could then be used to replace the whole of the testimony with no further need for the child witness to participate in the process at trial.<sup>249</sup> None of these hopes were realised in early legislation nor did the Youth Justice and Criminal Justice Act 1999 address these aspirations known as the 'full Pigot'. The compromise that followed coined the much used term 'half Pigot' for the special measures finally introduced.

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<sup>248</sup> Tempkin, *J Doing Justice to Children* 141 NLJ 315

<sup>249</sup> Pigot, *Judge T Report of the Advisory Group on Video Evidence* HMSO 1989

Following the 'Speaking up for Justice'<sup>250</sup> report, the Youth Justice and Criminal Evidence Act sought to address much of the early concerns in the gathering and presenting of evidence from vulnerable witnesses. However, the hope for a trial process conducted in such a way as to give a voice to all witnesses was overshadowed by concerns relating to the unduly complex wording of the 1999 Act and practical difficulties with implementation on a national scale.<sup>251</sup> In December 2004, a review of the system was announced, and the review Group produced its consultation paper 'Improving the Criminal Trial Process for Young Witnesses'. The consultation paper was finally published in June 2007 with a response from the Government in 2009.

The early commentary identified those elements creating cause for concern<sup>252</sup> and while numerous issues were raised by no means all were satisfactorily dealt with through the later consultation process. The initial reaction to the special measures in the YJCEA tended to focus on the methods used to collect evidence from children and the inherent difficulties posed in obtaining and using pre-recorded testimony. Questions were raised on the likely impact on the jury of removing the child from the court and the possibility that an environment in which the child was at a distance and not seen 'in the flesh' would desensitise the jury from the reality of the abused child. The constraints of working with the principle of orality seemed all too apparent. The issue of adequacy of training and the need for a sea change in the approach to the handling of trials in which special measures may be applicable were recognised as being in their infancy. Stevenson and Sood note:

it almost smacks of running before walking. Reforms are no doubt necessary but only if thought through to the end<sup>253</sup>

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<sup>250</sup> Home Office 1988

<sup>251</sup> Hamlyn, B Phelps, A Turtle, J and Satter Are Special measures Working? Evidence for surveys of vulnerable and intimidated witnesses, Home Office Resreach Study No 283 2004

<sup>252</sup> Birch,D 'A better deal for vulnerable witnesses' (2000) LR 223

<sup>253</sup> Stevenson, K Sood, U 'Pigot: the need for a good look at videos' (1990) LS Gaz

An important feature of the reforms introduced in the YJCEA was to extend the ambit of the measures beyond young witnesses to a wider class of vulnerable witness,<sup>254</sup> thereby opening up the opportunity to prosecute in such cases. The particular hurdles to be overcome in furthering such cases is clear when the only or main evidence is from a witness with learning difficulties and those witnesses find themselves in the adversarial process. Even with pre-recorded testimony witnesses whose condition results in a lack of engagement with the jury will continue to present, sometimes insurmountable, problems in the pursuit of a conviction. Lawyers are trained to be advocates and tend to exploit any perceived weakness to further the party by whom they are instructed. This zealous advocacy is at the core of the system of party control in the adversarial trial system. While lawyers owe a duty to the court, this duty does not extend to an obligation to understand and accommodate the needs of an opponent's witness. Questions asked of vulnerable witnesses are recognised as frequently inappropriate,<sup>255</sup> and this is made all the more apparent by the wide range of physical and learning conditions seen in witnesses with a varied ability to cope with questions asked in court. It is not difficult to understand the reluctance of those involved in the criminal justice system whose role is reporting and investigating such offences. When witnesses may not be perceived as 'normal' by the jury, the decision to pursue these allegations is likely to be a very difficult line to follow.

Birch<sup>256</sup> recognises this issue and suggests that if the system of special measures is to serve those for whom it was intended then educating the jury should be considered as a means of dealing with a lack of understanding. How this could be achieved, it is suggested, is by way of expert evidence. The recognition that all the difficulty in getting the testimony of the vulnerable witness before the court may do little more than to postpone the stage at which the witness will be disbelieved is a cause for considerable and understandable concern. Not only would the witness have endured the process of investigation and telling the story for a pre-recording of evidence-in-chief but may be left with the knowledge that what they said had proved inadequate. Birch accepts the importance of not influencing

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<sup>254</sup> ss16-17

<sup>255</sup> Plotnikoff and Woolfson 'Cross-examining children - testing not trickery' (2010) Archbold Review

<sup>256</sup> 'A better deal for vulnerable witnesses' (2000) LR 223

the jury with expert evidence in such a way as to prejudice a fair trial but highlights the lack of a level playing field in the use of the traditional adversarial system to exploit the lack of sophistication vulnerable witnesses display. *R v Robinson* [1994]<sup>257</sup> highlights the arguments arising in the use of expert evidence. In this case the complainant, a fifteen-year-old with learning difficulties, alleged that a babysitter had abused her. The babysitter, who was in an intermittent relationship with the complainant's mother, categorically denied the allegations. At the trial, an expert was used to assist in determining the competence of the witness to give testimony. The defence objected on the basis that this would lend credibility to the witness and subsequently appealed along those lines. The appeal was allowed:

evidence from a psychiatrist or psychologist may be admissible to show that a witness is unreliable or a confession is unreliable. But Mr Jones points out that there is no case in which psychiatric or psychological evidence has been admitted to boost, bolster or enhance the evidence of a witness for the Crown or indeed of any witness<sup>258</sup>

The 1999 Act allows for assistance to be provided by expert evidence only for those matters requiring a decision from the judge rather than the fact finding role carried out by the jury. Those matters include the test for competence and the appropriate special measures and, as such, are not matters for consideration by the jury.

The difficulty in understanding the particular disabilities faced by those giving evidence is made all the more difficult by the role of cross-examination in the traditional trial system. Cross-examination is aimed not only at testing the evidence but also aims to shake credibility; highlight inconsistency and insofar as possible establish an opposing position. While the inherent power of the court to deal with the trial in a way considered appropriate and fair may go some way towards reducing the worst type of questioning the judiciary can only go so far. Might a special measure to allow for expert evidence on

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<sup>257</sup> 1994 3 All ER 346

<sup>258</sup> per Lord Taylor of Gosforth CJ 1994 3 All ER 346 at 347

credibility have served a useful purpose in ensuring a level playing field and potentially give vulnerable complainants a voice which could be understood and interpreted by a jury? Birch suggests that expert evidence combined with judicial direction would have been a possible extension of the provisions.

Birch is not entirely scathing in her analysis of the Act. While inadequacies and missed opportunities are highlighted there is a welcome for the bringing together of complex provisions within one umbrella Act. Much of the provision is a drawing together of previous statutory and common law principles with the only new measure being that of pre-recorded cross-examination set out in s28. A source of continuing debate is that the only new concept within the 1999 Act remains to be brought into full operation and bars the way to achieving a complete implementation of the recommendations in the Pigot report.

Another early analysis of the special measures brought together by the 1999 Act can be found in Laura Hoyano's article 'Variations on a theme by Pigot: special measures directions for child witnesses'.<sup>259</sup> The early identification of the lack of implementation of many of the recommendations by Pigot has proved an enduring theme and cast a continuing shadow over progress made. The legislation has pre-recorded examination-in-chief as a central plank to reduce trauma for those vulnerable and intimidated witnesses eligible for assistance in a special measures direction. However, Pigot envisaged a system in which the child would not need to recount the events in a separate court hearing but in which the video could deal with all matters. This would have been a very significant reduction in the impact of the principle of orality and certainly serves to highlight the issues inherent in the adherence to its process. Pigot also recommended that the video could be used as partial testimony with supplementation as necessary by live testimony to complete the evidence-in-chief. The 1999 Act works on the premise that the whole of the video will be used, where admissible, and stand as evidence-in-chief with very limited exception. The measures within the 1999 Act did not allow the use of a TV link or screen as of right but by way of judicial leave. The lack of a third party to relay questions was not enacted as had

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<sup>259</sup> Crim LR 2000 250

been recommended by a majority of the committee. As with other commentary on the Act, the lack of simplicity in the rules relating to eligibility was recognised by Hoyano.

The complex web of rules served to create uncertainty over the use of pre-recorded examination-in-chief and prove daunting to those charged with its implementation. A particular source of concern arose from the inflexibility of the pre-recorded examination-in-chief once obtained. Even with the benefit of subsequent amendment,<sup>260</sup> the emphasis is on the use of the video to replace examination-in-chief, and the inflexibility of this approach requires prosecutors to view the recording as either acceptable to stand as testimony or not. Hanayo cites the approach of Canada<sup>261</sup> and New Zealand<sup>262</sup> in permitting a free choice in the use of similar pre-recorded material to stand towards, rather than replace in its entirety, the examination-in-chief. This does not mean to say that the child will always be called upon to supplement pre-recorded evidence so that if the recording adequately deals with those matters the prosecution seeks to establish it stands, and may replace, the whole of the examination-in-chief. However, a more flexible approach facilitates the possibility of taking the witness through more effective and compelling oral testimony. Interviewers would not be under such pressure to capture all that is necessary in the initial recording, and the witness could be brought to the stage of cross-examination with less pressure. Given the very limited scope for supplementary questions under the amended YJCEA those involved in deciding the viability of a prospective prosecution are more limited.

The precursor to the 1999 Act the 'Speaking up for Justice' report of the Home Office acknowledged difficulties in communication for vulnerable witnesses. Hanayo comments that much is expected of the provision in s29 to allow the use of intermediaries. This is particularly the case for the very young who would otherwise not be able to respond to questioning. Pigot anticipated the use of more appropriate childcare specialists to act as a

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<sup>260</sup> Criminal Justice and Public Order Act 1994, s50

<sup>261</sup> Criminal Code of Canada

<sup>262</sup> *R. v. Moke and Lawrence* [1996] 1 NZLR 263

conduit between the questioner and the child. Section 29 provides for the use of intermediaries and has been met with another cautious welcome.<sup>263</sup> This special measure in allowing for the use of an intermediary, discussed earlier, was seen as a means by which the rather complex and most technical language of the lawyer could be interpreted and thereby set in a more accessible context for the witness. The intermediary would equally facilitate the understanding of answers given and explain those responses given by the witness in a way that could be understood by the court.

However, it is not the role of the intermediary to put a 'spin' on the language of either side, and the intermediary must not add to the role of the questioner by second guessing or interpreting the line of questioning. The role of the intermediary is therefore akin to that of the interpreter, and any intervention is largely limited to enabling understanding of the dialogue rather than any enhancement of it. They cannot fully resolve the difficulties encountered by witnesses in following the language of the lawyer has been recognised in numerous studies.<sup>264</sup> The use of legalistic language, combined with the rigours, during cross-examination, has been recognised as the source of much difficulty in achieving an adversarial process capable of hearing the voice of the vulnerable witness:

The resultant gulf between the linguistic capacity of the witness and the demands of the cross-examination questions has been shown to have a significant adverse effect of the ability of witnesses to provide accurate and coherent testimony.<sup>265</sup>

Children and those with learning difficulties respond in a very different way than do their adult counterparts in the giving of oral testimony. Such witnesses find multi-faceted questions and questions posed simultaneously very difficult to interpret and can give answers to only one aspect of that which is asked rather than responding to each aspect

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<sup>263</sup> Ellison, L Crosse – examination and the intermediary: bridging the language divide?

<sup>264</sup> Plotnikoff, J and Woolfson, R 'In their own words: the experiences of 50 young witnesses in criminal proceeding', *Policy practice research series*, (2004) London NSPCC and 'Evaluation of young witness support' (2007) Ministry of Justice

<sup>265</sup> Keane *The Modern Law of Evidence* 2018

of the questions posed.<sup>266</sup> This can lead to the jury misinterpreting the answers given by the witness. To a significant extent, this may be because the jury members do not possess the requisite knowledge and understanding of the vulnerable witness to interpret properly the meaning conveyed in the answers given.

The very nature of cross-examination will often result in inappropriate treatment of the vulnerable witness. A frequently used strategic device within cross-examination is to lull the witness into a false sense of security by appearing to agree with the witness in order to disarm the witness before moving to a more challenging phase of questioning. This unfamiliar process will unnerve the most sophisticated witness and can only serve to undermine the ability of those less capable of providing evidence. For the vulnerable, understand nothing of such techniques, this line of questioning may well serve to confuse and frighten.<sup>267</sup> It follows that while the role of the interpreter allows for some aspects of communication to be dealt with, a fuller understanding of the language and approach to questioning required to achieve a more empathetic approach towards the vulnerable witness is some way off. The fundamental elements of the adversarial system, and in particular the training of advocates to achieve a result for the party on whose behalf they are instructed, stand in the way of developing techniques of questioning aimed at helping vulnerable witnesses find a means of telling their version of events.

Focusing on the admissibility and sufficiency of evidence in child abuse prosecutions early home office research looked at issues arising in the gathering of evidence and the particular concerns arising from the 'half Pigot'.<sup>268</sup> The research looked at why so many prosecutions in cases involving allegations of sexual or physical abuse of children proved unsuccessful. A sample of 94 cases was considered and comparisons drawn with other jurisdictions.

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<sup>266</sup> 'Pigot Unfulfilled: Video recorded cross-examination under section 28 of the Youth Justice and Criminal Evidence Act 1999' (2005) Crim LR 456

<sup>267</sup> Myers, J 'Paint the child into your corner' 10 Family Advocate 42, 43

<sup>268</sup> Davis, G Hoyano, L Keenan, C Maitland, L Morgan R Research findings (1999) Home Office

Key points in the research were the difficulties associated with the witness interview serving more than one purpose; the lack of guidance available for the police; the perception amongst prosecutors that achieving a conviction based on a child's unclear testimony is very difficult; the technical difficulties associated with the reforms (including issues relating to cross-examination) and the innovations seen in other jurisdictions.

The first Memorandum of Good Practice<sup>269</sup> provided the precursor to the later, far more detailed, Achieving Best Evidence<sup>270</sup> guidance on interviewing victims and witnesses and using special measures. The 1992 Memorandum was an important starting point in dealing with appropriate methodology in obtaining children's testimony. At the investigation stage, the interview was often an incoherent account with a huge amount of difficulty encountered by those involved in this early stage of investigation. The technical structure of examination-in-chief in the trial setting was difficult to manage and the avoidance of leading questions, prohibited in examination-in-chief, extremely difficult to achieve. Often interviewers were faced with obtaining an interview without a clear view of the case and the charges that may ensue. In terms of the decision to commence a prosecution, the Crown Prosecution Service lawyers said that while helpful, the tapes were too time consuming to review.<sup>271</sup> The whole process was perceived as fraught with difficulty, and a particular concern was the time taken to reach trial. The delay to the completion of the process of testimony by allowing the live (via TV link) cross-examination could damage the integrity of the evidence with issues such as contamination of evidence arising. The research clearly identified the problems with live cross-examination at this very early stage in the implementation of special measures:

Prosecuting counsel felt they had to rely on the trial judge to intervene where cross-examination was intimidating or unfair or where improper attacks were made on the complainant's credibility during the defence's address to the jury. However, it

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<sup>269</sup> Home Office and Dept of Health 1992

<sup>270</sup> Crown Prosecution Service Guidance 2011

<sup>271</sup> *ibid*

appeared that some trial judges were reluctant to intervene. These relatively few cases in which children were treated harshly loomed large in police and CPS consciousness.<sup>272</sup>

This early home office research also considered a comparative study with its focus on Canada; the US; Australia; New Zealand and Scotland. Practice in Canada and New Zealand allowed for much greater flexibility in the use of pre-recorded testimony with supplementary testimony acceptable and normal. Variations on the 'full Pigot' are seen in the above jurisdictions and were generally perceived to be working well. This early research drew conclusions that would come to be reconsidered, with attempts at further reform, by the later review 'Improving the Criminal Trial Process for Young Witnesses'<sup>273</sup> and included recommendations for standardised training; review of the Memorandum of Good Practice; specialist prosecutors; designated judges and greater flexibility in the use of pre-recorded testimony.

In 2006 the Home Office Online Report 01/06<sup>274</sup> published research into the question of whether special measures for vulnerable and intimidated witnesses were working. The report considered the implementation and effectiveness of the special measures. The conclusion was drawn that, while much had been achieved to encourage vulnerable and intimidated witnesses to give evidence in a way which sought to reduce and if possible eliminate the associated stress and trauma of testimony, more remained to be done.

Surveys and court observations showed that there was difficulty in identifying, recording and tracking vulnerable and intimidated witnesses by both the police and the Crown Prosecution Service. The police more readily identified the needs of child witnesses, but this tended to be limited to the obvious cases with less probing of the needs of potentially

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<sup>272</sup> *ibid*

<sup>273</sup> Office for Criminal Justice Reform June 2007 ref 282215

<sup>274</sup> Burton, M Evans, R Sanders, A 'Are special measures for vulnerable and intimidated witnesses working?', (2001) Home Office

vulnerable or intimidated witnesses in less obvious situations. The research in the report was conducted in two phases. The first phase was conducted prior to the implementation of special measures in 2000/01 and phase two falling after the bringing into operation of measures in 2003/04. During the first phase, about half of police forces thought they fell below satisfactory levels in the identification of vulnerable and intimidated witnesses whereas this had fallen to about a quarter in the second phase. The Crown Prosecution Service tended to see the fault in failing to identify witnesses potentially in need of special measures as lying with the police. In contrast, some judges considered the problem to lie, to some extent at least, with the Prosecution Service.<sup>275</sup> The court Witness Service was also identified as having shortcomings both in terms of witness identification and communication with the various agencies.

The adequacy of pre-trial support was considered by this report and improvements between phases one and two of the research acknowledged. However, the provision of appropriate levels of support at the trial stage was not matched by the support at the early investigative and pre-trial stage. This would create a situation in which, no matter how effective special measure may be to support the giving of testimony, a case would fail at a much earlier stage because of a lack of initial support.

It was clear from the responses to the study that the various agencies perceived the reforms as providing significant assistance in the support of vulnerable or intimidated witnesses. It was also clear that witness dissatisfaction arose from those measures either not available or not provided when requested.

Several problems were not addressed in the Speaking up for Justice Report.<sup>276</sup> A difficult aspect was the separation of the defendant from prosecution witnesses in the precincts of the court. Even if separate entrances were available the inevitable meeting in, for example,

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<sup>275</sup> *ibid* at p 28

<sup>276</sup> Home Office 1988

the toilets in shared areas outside the courtroom posed understandable concerns for vulnerable and, perhaps even more so, for intimidated witnesses. However, witnesses did not wish to be perceived as being segregated or as in some way hiding from the defendant. Nor could the court, a neutral element in the criminal justice system, be seen to be inferring anything adverse about the defendant or the defendant's entourage from such segregation.<sup>277</sup>

In evaluating effectiveness, the report considered effectiveness to mean encouraging witnesses who would not otherwise give evidence; to allow for the effective giving of that evidence by victims and vulnerable witnesses and to thereby minimise the stress and trauma associated with testimony. The pre-trial process is shown by surveys of all those both involved in the giving of evidence and the facilitation of it to be crucial and under resourced. Also, judicial attitudes with a leaning towards live as opposed to pre-recorded testimony were noted:<sup>278</sup>

This research has shown that effort must now be directed at the investigation and pre-trial processes as much as at the court processes, for more of these court cases to be successful.<sup>279</sup>

An evaluative view of this Home Office research was necessary to shed further light on the issue of whether the special measures directions in the Youth Justice and Criminal Evidence Act 1999 had done as was hoped in reducing the disadvantages of the adversarial system for those least able to cope with the orthodox trial system. Clearly the research showed the need for critical appraisal of the measures and suggestions for more effective practical application of the provisions within the criminal justice system. This evaluation followed swiftly on the heels of the Home Office Research in a number of publications the first of which was deft in its appraisal of the status quo and suggestions for further steps to

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<sup>277</sup> *ibid* 34 at p 63

<sup>278</sup> *ibid* at p 71

<sup>279</sup> *ibid* at p 72

improve those problems identified.<sup>280</sup> Burton et al. identified the crux of the problem in asking the question of whether what had been enacted and introduced in practice to date could do the job of supporting the vulnerable or intimidated witness without further legislative change. The compelling arguments of the need to have measures in place in the pre-trial and investigative stage as much as during the trial itself were apparent from the outcome of the Home Office research. This need to address all stages of the criminal justice system was reiterated by Burton et al. While the experiences of vulnerable or intimidated witnesses appears to have improved to a significant level by the introduction and implementation of special measures is the real problem the traditional adversarial process itself?

Might the more radical overhaul of the orthodox trial process be the way forward with a move towards the inquisitorial system seen in European countries?<sup>281</sup> However, the measures to assist vulnerable or intimidated witnesses are grounded in the need to for a practical and pragmatic stance and as such esoteric arguments aimed at radical dismantling of the orthodox trial process are unlikely to gain popular support. The reality is that the current trial system is embedded and continuing but does not necessarily need to be endured 'warts and all'. The features most notably giving rise to 'warts and all' from the point of view of the witness are arguably confrontation between witnesses and the accused (together with the accused's entourage); the witness statement and the three stage test of that statement with the particular rigours to be endured through the final stage of that process: cross-examination. The principle of orality can be identified as the centrepiece of these issues.

Burton et al recognised the improbability of radical reform and in drawing conclusions on the efficacy of the special measures commented:

On the assumption that procedural revolution is highly unlikely, at least for the foreseeable future, we have examined how effective the measures introduced by the

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<sup>280</sup> Burton, M Evans, R Sanders, A (2007) *International Journal of Evidence and Proof*

<sup>281</sup> Ellison, L *The Adversarial Process and the Vulnerable Witness* OUP 2001

YJCEA and accompanying administrative and practical developments have been in mitigating the deleterious effects of the adversarial system.<sup>282</sup>

Burton et al conclude that the processes for identifying vulnerable or intimidated witnesses need to be addressed with an approach taken to accommodate the individual rather than a 'one size fits all' ethos. To achieve an outcome tailored to the needs of the individual, the views of that individual must be sought. It follows that a greater hands on approach is required with the various agencies engaging in direct discussion with an emphasis on early preliminary meetings to assess appropriate strategy. Vulnerable and intimidated witnesses should not be categorised in a broad sense and subsequently labelled as needing a type of measure but assessed and supported individually. It is crucial that the witness is listened to and participates to enable the process to work most effectively.<sup>283</sup> It follows that an improvement in identifying such witnesses is necessary with more effective procedures to identify the needs of each witness. It is suggested that consideration be given to the visual recording of all initial interviews which would then reduce the pressures faced by witnesses in preparing and understanding the witness statement to be used to support the anticipated testimony.

An overlooked issue in the prevalence of the principle of orality is to acknowledge the prevalence of functional illiteracy among the general population and to consider the development of measures to support those witnesses with this disadvantage. The adversarial trial system assumes a robust witness capable of testing. In a system where credibility and reliability are frequently assessed by reference to such abilities in statements provided prior to the giving of oral testimony, surprisingly, such issues were not addressed in the Speaking up for Justice Report:<sup>284</sup>

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<sup>282</sup> Burton, M Evans, R Sanders, A Are special measures for vulnerable and intimidated witnesses working? Home Office 2006

<sup>283</sup> Ibid

<sup>284</sup> Home office 1988

The final point to be addressed by Burton et al. is the insidious nature of cross-examination and the lack of regulation of the private bar in its aggressive approach to this final stage of the examination process.

However, we recognise that aggressive cross-examination lies at the heart of the adversary system, and that curbs will never go far enough to put nervous witnesses on a level playing field with 'normal' ones. To this extent, there is no doubt that adversarialism will always be an obstacle to some witnesses giving best evidence.<sup>285</sup>

The difficulties remaining to be addressed in the nature and format of cross-examination are significant and extensive. It is clear that the adversarial system and the part played by cross-examination poses particular concerns for the vulnerable or intimidated witness (as it does for the 'normal' witness) and as such are considered further in Chapters 5 and 6 of this thesis. The principle of orality however underpins the training of barristers and results in the inculcation of a mindset which then requires amelioration through further training rather than addressing fact finding from a different standpoint. This point has been recognised and training framed to modify the effects of the adversarial emphasis. The Inns of Court College of Advocacy, produced its own training based on empirical research, *Raising the Bar*,<sup>286</sup> and considers the particular concerns faced by the most vulnerable witness:

The Working Group (WG) heard a large volume of evidence in a period of 20 months<sup>3</sup> from a wide range of experts and individuals with first hand experience of vulnerable witnesses, victims and defendants:

HM Court Service (*Chapter 3*), Child/ Adolescent Psychiatrist (*Chapter 4*), Judges (*Chapter 5*), Adult Learning Advisors (*Chapter 6*), Practitioners at the Bar (*Chapter 7*), CPS Trainer (*Chapter 8*), Police (*Chapter 9*), Respond UK4 (*Chapter 10*), Social

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<sup>285</sup> Burton, M Evans, R Sanders, A Are special measures for vulnerable and intimidated witnesses working? Home Office 2006

<sup>286</sup> *Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court Advocacy Training* Council 2011

Workers (*Chapter 11*), Intermediaries (*Chapter 12*), Witness Support (*Chapter 13*) and the Nuffield Foundation/ NSPCC (*Chapter 14*).

Their evidence was revealing. It provided a host of invaluable insights into the fears, problems and difficulties experienced by vulnerable people when in the Court system, whether as witnesses, victims or defendants. In addition, it demonstrated the challenges that understanding and handling such vulnerable people present, if they are to be dealt with fairly and sensitively, and in a manner that will achieve 'best evidence' (*Chapters 3-14*).<sup>287</sup>

A broader category of vulnerable or intimidated witness now has access to special measures. However, the Pigot advisory group considered young witnesses, and it was the particular plight of the child in the criminal justice system which gave rise to the greatest concern and sparked the debate over possible reforms over two decades ago.

The publication of *In Their Own Words*<sup>288</sup> spurred the government into a review of child evidence and a subsequent consultation process.<sup>289</sup> The review group noted areas of concern appropriate for consultation and identified particular issues for consideration. These issues included recognition that young witnesses would often prefer greater choice in the process of giving evidence rather than be faced with the presumption that evidence should be given via a link rather than in court. The group suggested the possibility of enhancement of existing special measures and the use of advances in technology to improve the process. The need for measures to cover the early stages of the criminal process, rather than just the experience of the trial itself, was identified as important. To take a case forward, an initial assessment of individual needs rather than assumed measures based on broad categorisation should be considered. The provision of appropriate pre-trial support and therapy was also regarded as important. In all, the measures were reviewed to identify the most effective means by which the child might

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<sup>287</sup> Ibid at p4

<sup>288</sup> Plotnikoff J, and Woolfson R, (2004) 'In their own words: the experiences of 50 young witnesses in criminal proceedings', Policy practice research series, London NSPCC and Evaluation of young witness support Ministry of Justice, (2007)

<sup>289</sup> Improving the Criminal Trial Process for Young Witnesses: A Consultation Paper 2007

participate in the system of criminal justice. The consultation process focused on these issues and, while no commitment was given to the implementation of outcomes arising from consultation, a detailed and broad ranging exercise was undertaken. Respondents were sought from the various agencies engaged in the criminal justice process as well as practicing professionals and the academic community.<sup>290</sup>

### **4.3 The Effect of the Principle of Orality in Delays and Court Process**

A particular concern was the delays seen in the system and the damage done to the child witness while waiting. Delays are experienced both in waiting for the case to be listed for trial but perhaps more damaging for the young witness is experiencing delays on the day of the trial itself.<sup>291</sup> If it were possible to keep the child away from the court process altogether this would not be so great an issue. The current position is not likely to achieve this aspiration so the experience of the 'day in court' must be addressed. The build-up to the trial inevitably causes stress to witnesses, and the child witness will be all the more vulnerable to this. That stress is then made all the worse by long waits within the precincts of the court at the trial itself to complete the process of giving evidence. It is no surprise that on review, it was felt important by the child review group to reduce waiting experienced on the day of the trial itself. One approach is to list trials involving children to start in the afternoon which then allows for all the time consuming processes such as jury swearing in, opening speeches and legal arguments to be dealt with during that afternoon with the child brought the following morning at a point in the trial when the time for the giving of evidence can be more accurately managed.

The consultation included a recommendation related to the strong view of the child review group that young witnesses should receive appropriate pre-trial support and therapy to enhance the prospects of that witness giving the best evidence possible. The Office for

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<sup>290</sup> Ibid annex C

<sup>291</sup> Henderson H and Lamb M Pre-recording children's trial testimony: effects on case progression 2017 *Crim. L.R.* 345

Criminal Justice Reform was engaged in evaluating existing provision for the support of witnesses to bring best practice to the support of child witnesses. This was considered very important in improving the experience of the criminal justice system for the child and to enhance the conviction rate by enabling best evidence to be given. At the time of the consultation in 2007, 165 Witness Care Units were operating and provided a single point of contact for witnesses from charge to trial. While these units helped identify and meet the basic needs of the witness, the Review Group expressed greater interest in a Witness Support, Preparation and Profiling scheme in Liverpool. This scheme dealt with some of the most vulnerable adult witnesses giving evidence locally. Significantly the scheme did not limit involvement to the basic assessment of needs but conducted a more individual analysis of the likelihood of a witness being capable of giving persuasive evidence at trial. The scheme earned a recommendation of good practice from the CPS Inspectorate<sup>292</sup> given the success of the scheme and the sharing of outcomes with the CPS to improve good practice and avoid bad practice.

The Ministry of Justice heralded its response to the consultation via a news release with the headline 'Improved Care for young, vulnerable witnesses' in which the Justice Minister said:

Giving evidence in court can be a frightening experience for children and other vulnerable young people. Over the past ten years we have made significant improvements to the way are treated– but does not mean we could not do better.<sup>293</sup>

A rather simplistic statement does little to convey the lengths pursued to delve into the principle of orality and somehow find a way through for the vulnerable. The statement is commendable in accepting a level of responsibility for the continued monitoring and improvement of the support services available but the question to be considered is the adequacy of the commitment in practical terms. The principle of orality has been

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<sup>292</sup> Report on the joint inspection into the investigation and prosecution of cases involving allegations of rape  
London: HMCrown Prosecution Service Inspectorate and HM Inspectorate of Constabulary; 2002

<sup>293</sup> <http://www.justice.gov.uk/news/newsrelease250209.htm>

addressed in these important measures, but radical fresh systematic thinking continues to hamper the fundamental nature of the administration of justice.

#### **4.4 Work in Progress**

The following chapter continues by considering developments in trial procedure and the future of the principle of orality. However, the impact of the work in progress to modify the way vulnerable and intimidated witnesses meet the considerable hurdles of the traditional adversarial trial system continue to demonstrate how the embedded process through the receipt of oral testimony must remain under review. While the very significant improvements brought about through the introduction of special measures directions should not be underestimated continuing modification of the system must monitor to ensure a response in respect of those areas where the experience of vulnerable or intimidated witnesses is plainly lacking. Laura Hoyano identifies the need for continuing reform in the adversarial trial system for vulnerable witnesses and defendants:

Notwithstanding these laudable reforms, there is disconcerting evidence that vulnerable witnesses and defendants still fall through cracks in the current protective regime, due to operational failure and organisational culture.<sup>294</sup>

So, while further empirical work to capture a more up-to-date picture of the experience for those witnesses in receipt of special measures is to be recommended.<sup>295</sup> Furthermore, radical reforms have been mooted as necessary to make progress. Much of what is suggested by Laura Hoyano focuses on the particular issues arising on cross-examination. In terms of the principle of orality, cross-examination illustrates the most significant departure from any previously experienced norm of enquiry for most witnesses. It is cross-examination which gives rise to the greatest controversy and insurmountable issues in

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<sup>294</sup> Hoyano L, 'Reforming the adversarial trial for vulnerable witnesses and defendants.' *Crim. L.R.* 2015, 2, 107-129

<sup>295</sup> *ibid* at p.3

establishing more complete reform. It is this part of the fact-finding process which has given rise to the greatest difficulty in implementing the Pigott report<sup>296</sup> and continues to be the source of the most radical suggestions for reform by Laura Hoyano. One suggestion is to remove the role of cross-examination from the advocate seeking to test the witness's testimony.

A proposal apparently gaining traction with the Ministry of Justice (MOJ) is to confiscate from council the function of cross-examining the vulnerable witness. Various replacement cross examiner's been suggested – all, it is assumed, capable of performing a more competent and fair cross-examination than the most highly trained barrister and a close judicial supervision.<sup>297</sup>

The range of radical suggestions include examination by a police interviewer, utilising an intermediary, replacing advocates with the trial judge as cross-examiner, combining cross-examination with the achieving best evidence interview, requiring approval in advance for questions to be asked in cross-examination, and allowing independent legal representation for complainants. Of these proposals, one had been recognised as a way forward in 2014 when the former director of public prosecutions Sir Keir Starmer in an interview with the BBC. He said the combative atmosphere of court cross-examination had obvious downsides for some witnesses, adding: "Perhaps judges should be given the task of questioning young and vulnerable witnesses?"<sup>298</sup>

In *Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process*,<sup>299</sup> the trauma associated with becoming a victim of crime is considered. A particular area for concern is the impact of participating in the trial process that may serve to embed the impact of trauma rather than provide a therapeutic process of achieving justice:

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<sup>296</sup> Cooper D, 'Pigot Unfulfilled: Video recorded cross-examination under section 28 of the Youth Justice and Criminal Evidence Act 1999', 2005 Crim LR 456

<sup>297</sup> Hoyano L, 'Reforming the adversarial trial for vulnerable witnesses and defendants.' Crim. L.R.2015, 2, at p112

<sup>298</sup> Keir Starmer: Victims face 'unacceptable court ordeal' BBC News 7 April 2014

<sup>299</sup> Ellison L, Munro VE, July 2017 IJEP 21 3 (183)

the ways in which criminal procedure—including its adversarial structure, timescales for trial processing and distrust of therapeutic interventions—may entrench and augment the vulnerabilities of traumatised witnesses.<sup>300</sup>

The whole swath of issues considered in relation to the trial process, in particular the place of the principle of orality, serve to create stress but the effect of cross-examination stands out as a force for generating anxiety:

Of all the sources of anxiety that weigh on the mind of a complainant as they proceed through the criminal justice process, the prospect of undergoing cross-examination is paramount (Hunter et al., 2013; Rock, 1993). In an adversarial system, such questioning may involve an attack on a witness's character in order to undermine her credibility and/or an interrogation of highly personal aspects of her private life. It is widely acknowledged that the experience of cross-examination can be a highly stressful one, even for professional witnesses (e.g. police officers and experts).<sup>301</sup>

The principle of orality is entrenched, and there is clear recognition that special measures are required to ameliorate the worst of its effects for vulnerable or intimidated witnesses. Research is limited into the impact of cross-examination on those witnesses with intellectual disabilities (ID) who are bound to face difficulty navigating the adversarial process. Again, only those modifications available to support witnesses through special measures enable the giving of evidence by those with such issues brought to face the court system:

There is a dearth of research into actual court cases and the lived experiences of the cross-examination process and communication challenges faced by people with ID. This systematic review, which to our knowledge is the first of its kind, has also highlighted the need for further research in some key areas:

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<sup>300</sup> Ibid at p 2

<sup>301</sup> Ibid at p 9

confabulation; mental age of adults and performance indication; using multiple-choice questions with and without pictures for enhanced recall and accuracy; witness understanding of court language; and research that takes into consideration other factors beyond IQ levels. Intellectual disabilities are diverse and complex and any research into the communication challenges people with ID face during cross-examination can only give a generalised overview. Witnesses are all individualistic, therefore any intervention to support and enhance communication during cross-examination needs to be person-centred to the individual witness.<sup>302</sup>

The United Nations Convention on the Right of the Child (CRC) entered into force on 2 September 1990<sup>303</sup> and sought to enshrine the principles proclaimed in the Charter of the United Nations in embedding the dignity and inalienable rights of all members of the human family as being the foundation of justice and peace in the world.<sup>304</sup> The child is recognised as being in a special category and "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth<sup>305</sup>".

The articles of greatest import in relation to an international perspective with potential to reinforce the arguments in this thesis in terms of court process are articles 5 and 12:

### ***Article 5***

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a

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<sup>302</sup> Morrison J, Forester-Jones R, Bradshaw J, Murphy G, Communication and cross-examination in court for children and adults with intellectual disabilities: A systematic review October 2019 IJEP 23 4 (366)

<sup>303</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577

<sup>304</sup> Ibid preamble

<sup>305</sup> Ibid

manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

### **Article 12**

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Through Article 5 children ought to be able to develop and as they build competence acquire an ability to participate in decisions with the support and guidance of their parents or guardians<sup>306</sup> and this feature of developing towards autonomy ties closely with the right to be heard in court proceedings. Chapter 5 of this thesis considers the role of a determination of competence enabling children to have their evidence received. Although domestic law does not specifically reflect article 5 a lack of adherence to this concept in domestic legislation would plainly give rise to a failure to meet this principle.

As children develop they will evolve in their capacity and as such when taken together with Article 12 (the right to be heard) children have a right to participate in matters affecting them once able<sup>307</sup>.

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<sup>306</sup> Child Rights International Network Guide to Children's rights  
<https://archive.crin.org/en/home/rights/convention/articles/article-5-parental-guidance-and-childs-evolving-capacities.html> accessed 23 December 2020

<sup>307</sup> *ibid*

The 'right to be heard' enshrined in Article 12 (1) of the UN convention on the Rights of the Child (CRC) is possibly the most discussed and certainly the most controversial principle in the arena of children's rights<sup>308</sup>

In terms of linking the principle of 'the right to be heard' with current domestic legislation on testing competence in court proceedings section 53 of the Youth Justice and Criminal Evidence Act seeks to facilitate the giving of evidence based on an ability to understand questions and provide answers which can be understood<sup>309</sup>. As such the idea that a child must be a particular age is not at the fore, rather the stage of development is the determining factor and to that extent this concept ties with the principles set out in the CRC.

Although the international context falls outside the scope of this thesis there are plainly parallels and implications to be drawn if UK process does not meet the principles enshrined in Articles 5 and 12. Illustrations in developing case law demonstrate that the courts of England and Wales do not operate in a vacuum and as such the principle of orality and its predetermined starting point should not impede these principles. In *ZH (Tanzania) v SSHD*<sup>310</sup> two children aged 12 and 9 at the point of the judgment who, having been born in the UK to a British citizen father and a Tanzanian national mother, were said by the Court of Appeal could reasonably follow their mother to Tanzania. The Supreme Court judgment was unanimous in finding the best interests of the child must be a paramount consideration:

It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests.<sup>311</sup>

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<sup>308</sup> Daly A, 'Children, Autonomy and the Courts: Beyond the right to be heard' (2018) Brill 2017

<sup>309</sup> See chapter 5 of this thesis

<sup>310</sup> In *ZH (Tanzania) v SSHD*<sup>310</sup> [2011] UKSC 4

<sup>311</sup> Per Lord Kerr *Ibid* at para 46

In terms of addressing the implications for court process a failure to move in the most appropriate way to gather evidence without taking account of the best interests of the child is flawed. Adherence to the principle of orality as a starting point hinders movement toward a system best suited to the needs of the child in the litigation landscape.

In considering the impact of a refusal to allow a child to give oral evidence and the effect of Article 12 the judgment of the Court of Appeal in CRC P-S (Children)<sup>312</sup> is illuminating. A 15 year old who was the subject of care proceedings wished to give evidence to support a desire to be returned to the care of his mother. The impact of Article 12 pervades the judgment and the 'right to be heard' was considered by the court in determining the appropriateness of the desire of the child to achieve that by giving oral testimony. In the instant case the Court of Appeal decided that the particular case at hand did not require oral testimony to be the means by which the child should be heard given the preference to be returned to the care of the mother had been clearly conveyed by the Guardian and counsel. However this case shows the implications for the development of systems facilitating the principles enshrined in Article 12 CRC. The best way to ensure compliance with the CRC may be through a procedural pallet unhindered in its development by the principle of orality as an archaic starting point. Article 12 CRC defends 21<sup>st</sup> century rights and fresh thinking in relation to how best it should be met is arguably preferable.

Child friendly justice guidelines can also be seen developing in the Council of Europe.<sup>313</sup>

Child-friendly justice is justice that is:

- accessible;
- age appropriate;
- speedy;
- diligent;
- adapted to and focused on the needs of the child;
- respecting the right to due process;
- respecting the right to participate in and to understand the proceedings;
- respecting the right to private and family life;

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<sup>312</sup> P-S (Children) [2013] EWCA Civ 223

<sup>313</sup> Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies)

- respecting the right to integrity and dignity.<sup>314</sup>

A catalyst for the change addressed in these guidelines was the case of *T and V v The United Kingdom*<sup>315</sup> in which the applicants (aged 10 at the time of the offence) alleged violations of the European Convention on Human Rights. This was based on the process used at trial which, at the time, differed little from that of an adult. The criticism levelled at the UK trial system in relation to its treatment of child defendants illustrates that a traditional starting point for the running of trials will not be acceptable and process must be developed to reflect the expectations of the principles of child friendly justice.

Children in conflict with the law have the right to be processed through a separate juvenile justice system tailored to their special situation and should never be subjected to public criminal trials. Article 37 of the CRC also specifies that detention should only be used as a matter of last resort for child offenders and for the shortest period of time possible, and Article 40 requires that States design juvenile justice systems with the “desirability of promoting the child's reintegration and the child's assuming a constructive role in society” in mind. It is difficult to see how an indeterminate sentence with no defined end point could meet these standards, and CRIN believes that potentially lifelong sentences of imprisonment are never appropriate for children, however serious the nature of their offences.<sup>316</sup>

## 4.5 Conclusion

The foregoing chapter analyses this particularly persuasive area for reform. The special measures considered have followed close scrutiny of the effect of adherence to the principle of orality. A revised template to allow for the provision of a forum in which all witnesses may be heard is demonstrably hard won. Together with the critique of developing trial processes in Chapter 5, the argument is built to demonstrate that the

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<sup>314</sup> Ibid part 1

<sup>315</sup> *T and V v The United Kingdom*: ECHR 8 Apr 1999

<sup>316</sup> Child rights international network <https://archive.crin.org/en/library/legal-database/t-and-v-v-united-kingdom.html> accessed 23 December 2020

developments over decades could have been achieved more efficiently by policy unconstrained by the weight of tradition.

Chapter 5 considers the future of the adversarial trial system. The taking of a holistic view to reform with the change of emphasis on the appropriateness of procedure rather than continuing with modification of that which is settled practice.

## CHAPTER 5 - DEVELOPMENTS IN TRIAL PROCEDURE AND THE FUTURE OF THE PRINCIPLE OF ORALITY

### 5.1 Introduction

The previous chapter illustrates the extent to which the principle of orality has impacted on procedural considerations governing the receipt of testimony from particular categories of witness. Other aspects of the adversarial system impact on the ability of the witness to engage in the trial process. Closely linked with the procedures whereby evidence is received is the issue of competence. Whether or not a witness is competent is the very starting point for the principle of orality. Unless a witness satisfies requirements for competence in the process of receiving oral testimony from that witness cannot occur.

While the test for competence is vital in the process, its link with the principle of orality has created another hurdle for those witnesses who are vulnerable. This can be demonstrated in previous opinions towards the ability of young children to give evidence and the test imposed to assess competence. In a study of attitudes towards the competence of child witnesses Judy Cashmore and Kay Bussey<sup>317</sup> highlighted an issue which, unless addressed, may undermine any number of special measures set in place:

It is not only children's abilities and their reliability as witnesses that are important; so too are the perceptions and the competencies of the adults who deal with them. Even if children are capable of giving accurate evidence, their evidence will be of limited value unless they are perceived as credible witnesses by those dealing with them: lawyers, prosecutors, police, judges, and juries. Additionally, children's competence is not simply a function of their abilities. It also depends on the competence of the adults with whom they interact (Melton & Thompson, 1987).

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<sup>317</sup> Casmore, J Bussey K Judicial Perceptions of Child Witness Competence Law and Human Behaviour, Vol 20 No 3 1996

Lawyers need to be able to communicate effectively with children; judges and magistrates need to ensure that children are comfortable and able to testify effectively; and jurors need to be able to draw proper inferences from children's testimony.<sup>318</sup>

Adults all too often fail to understand how children express themselves. This is a significant issue when those deciding the facts perceive the demeanour of the witness in court as crucial. The jury may well take clues from the way in which a witness behaves to try to draw conclusions as to the reliability and, perhaps most importantly, credibility of the testimony. The extent to which these assumptions about human nature have any basis in fact have been subject to scrutiny and doubt. This is pivotal to the principle of orality. The trial procedure is seen as a ceremony capable of providing a forum suitable to test such evidence, but there is argument that this view of the 'impressive witness' and the capacity of such a witness to withstand the test of court scrutiny is a myth.<sup>319</sup> Prior to the reforms introduced in the Youth Justice and Criminal Evidence Act 1999, the test for competence could be seen as a particular hurdle imposed on children and other vulnerable witnesses in a way not faced by adults and other 'normal' witnesses.

## 5.2 Testing Competence

Until the reforms introduced by the Youth Justice and Criminal Evidence Act 1999 the evidence of children under 14 could be given unsworn if the child was capable of giving intelligible testimony.<sup>320</sup> It followed that the child was subjected to an assessment of that requirement to meet competence in a way adult witnesses were not. Also, this provision resulted in those over the age of 14 being prevented from giving testimony at all unless they satisfied the test for giving sworn evidence. The test for sworn evidence was such that the witness should demonstrate a sufficient appreciation of the seriousness of the occasion and the special duty to tell the truth under oath before the evidence could be

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<sup>318</sup> *ibid* at p 313

<sup>319</sup> L RE 'Oral v Written Evidence': The Myth of the Impressive Witness (1983) 57 Australian Law Journal 679

<sup>320</sup> Criminal Justice Act 1988, s33A

received.<sup>321</sup> Very significant improvement in the assessment of competence and the use of sworn testimony was enacted in the YJCEA 99.

The current provisions are set out in ss53-57 of the Act and apply to all witnesses rather than specifically selecting children for scrutiny. The test for competence is contained in section 53:

**Competence of witnesses to give evidence:**

(1) At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.

(2) Subsection (1) has effect subject to subsections (3) and (4).

(3) A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to—

(a) understand questions put to him as a witness, and

(b) give answers to them which can be understood.

The test introduced by section 53 is to be welcomed in setting out a general test for competence without the age of the witness being a factor. It follows that unless the judge assesses a witness as able to understand the questions put and give answers which the court can understand they will not reach the threshold of competence. While it is for the party tendering the witness to satisfy the court as to competence, there is a presumption that witnesses do not fall into the category of ‘incompetence’ unless there is a patent need to enter into enquiry on the point, and this will not be simply because the witness is a child. Diane Birch in her review of the legislation in 2000 comments:

Section 53's formula leaves less room for interpretation than the intelligibility test. It is intended to ensure “that as many people as possible are able to give evidence at trial” and that no “unfair hurdles” are set for them. Although the burden of proof

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<sup>321</sup> *R v Bellamy* [1985] 82 Cr App R (CA)

remains with the party tendering the witness, the Act leans as far as possible in favour of competence by requiring the issue to be determined as though the witness had the benefit of any “special measures direction” which the court is minded to give.<sup>322</sup>

The assessment of competence is very much assisted by the assumption that the witness will have the benefit of any special measures direction that the court has or may give to enable the threshold to be met.<sup>323</sup> The important decision of *Barker*<sup>324</sup> illustrates the importance of looking at the individual witness in the assessment of competence without holding views as to the credibility of child witnesses, or any other particular category of witness, which would result in different scrutiny by comparison with ‘normal’ adult counterparts. It is a matter of law for the judge whether the test for competence is satisfied and not one for the exercise of a general discretion. To satisfy the test, the child does not have to show an ability to deal with every question and to supply an answer capable of being understood in response to every one of those questions. Such a high hurdle may cause capable adults to fall and should not be imposed simply because it is a child whose competence is to be assessed. Clearly, the *Barker* case recognized the importance of the age of the child in the assessment of competence and it must be accepted that, while age is not a determining factor, there does come a point when age will preclude the very young from satisfying the formula laid down in section 53.

In particular, although the chronological age of the child will inevitably help to inform the judicial decision about competency, in the end the decision is a decision about the individual child and his or her competence to give evidence in the particular trial.<sup>325</sup>

The background to *Barker* is particularly poignant as the child concerned was the sister of ‘Baby P’ who was so tragically killed at the hands of his mother and her partner, Stephen

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<sup>322</sup> Birch, D A better deal for vulnerable witnesses [2000] LR 223

<sup>323</sup> YJCEA s54(2)

<sup>324</sup> *R. v B* [2010] EWCA Crim 4

<sup>325</sup> *ibid*

Barker. In terms of the reformed test of competence in section 53, *Barker* is important in emphasizing the importance of treating children appropriately. What is so compelling in the Barker case is the young age of the little girl giving evidence. The child was only two and a half at the time of the commission of the offence; three on the first revelation of the offence to her foster mother and four and a half at the time her testimony came to be considered. Barker was clear in prescribing the use of the plain words of section 53 without any further gloss and confirmed earlier guidance.<sup>326</sup>

In short, it is not open to the judge to create or impose some additional but non-statutory criteria based on the approach of earlier generations to the evidence of small children.<sup>327</sup>

*Barker* is an important decision in confirming that children are to be dealt with following the plain intention of Parliament in the use of the statutory formula for assessing competence. The enactment of section 53 acknowledges a general consensus that children are able to give accurate and truthful accounts and is indicative of a more appropriate approach than simply to say the child may be 'telling tales'. It is notable that given the child in *Barker* provided evidence crucial in the finding of guilt that without her evidence the accused would have been able to commit this most serious sexual assault on a very young child with impunity. An issue that remains following *Barker* is the trauma undergone by the witness in such circumstances. It is a welcome advance that the reformed test of competency allows the witness to be heard. However, the very young child in a case such as this, which remains disputed, must then still undergo the daunting test of live cross-examination. The lack of a general implementation of section 28 of the Youth Justice and Criminal Evidence Act means that, where a very young child has provided pre-recorded examination-in-chief, further delay must be faced together with further court attendance to allow the completion of the process embedded within the orthodox trial.

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<sup>326</sup> *MacPherson* [2005] EWCA Crim 3605

<sup>327</sup> *R. v B* [2010] EWCA Crim 4 at 39

Once it has been ascertained that the witness is competent to give evidence in accordance with the test set out in section 53 the question as to whether that evidence will be sworn is very much more straightforward under the revised provisions of the YJCEA 99.

Section 55 states:

(1) Any question whether a witness in criminal proceedings may be sworn for the purpose of giving evidence on oath, whether raised—

- (a) by a party to the proceedings, or
- (b) by the court of its own motion,

shall be determined by the court in accordance with this section.

(2) The witness may not be sworn for that purpose unless—

- (a) he has attained the age of 14, and
- (b) he has a sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath.

(3) The witness shall, if he is able to give intelligible testimony, be presumed to have a sufficient appreciation of those matters if no evidence tending to show the contrary is adduced (by any party)

The common law test set out by the Court of Appeal in *Hayes*<sup>328</sup> is reflected in section 55. This states that that for a witness to give evidence on oath there should be a sufficient appreciation of the solemnity of the occasion and an understanding that the duty to speak the truth in court is higher than that duty in everyday life. The decision in *Hayes* acknowledged that a secular approach should replace any concept of religious attitudes towards the test to be applied. There is a rebuttable presumption that any witness satisfying the test for competence should be taken to satisfy the test for sworn evidence. However, it may well become apparent that the assessment of competence at the early stage of the process of testimony turns out to be doubtful as the testimony progresses.

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<sup>328</sup> *R. v Hayes* [1977] 64 Cr. App. R. 194 CA (crim Div)

For example, a case when a young child or vulnerable witness unravels during testimony and cannot continue to understand questions or give answers capable of being understood. In a situation where the test for competence has been a balanced consideration, such as with a young child, the judge ought to keep the question of competence under review.<sup>329</sup> If the child is not able to continue to achieve the test for competence during the process of testimony, the judge may consider exclusion of the testimony under the general discretion to exclude evidence if to include it may result in an unfair trial.<sup>330</sup> This approach was considered in *Barker*:

If the child witness has been unable to provide intelligible answers to questions in cross-examination or a meaningful cross-examination was impossible the first competency decision will not have produced a fair trial, and... could reasonably be excluded under section 78 of the 1984 Act.<sup>331</sup>

These issues relating to the test for witness competence must be considered in conjunction with any reform of the principle of orality. The two are inextricably linked, and the issues must be considered together.

### **5.3 Achieving Best Evidence**

The principle of orality, with its resultant link with oral testimony, does not stand in a vacuum. All evidence stems from investigation and any reforms to the principle of orality must be considered in that context. While reforms may be applied more broadly the particular impact on vulnerable witnesses highlights the need to achieve best evidence from the investigatory stage leading to familiarisation with the procedures at the eventual trial:

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<sup>329</sup> Malicki [2009] EWCA Crim 365

<sup>330</sup> s78 PACE

<sup>331</sup> at 43

Of course, it is of utmost importance that the equilibrium between testing witness veracity and obtaining accurate reports from the witness is maintained. Accordingly, the pre-trial process needs to ensure that witnesses are aware of what is expected of them in the courtroom; that is, they should be given information about the procedure, be offered the opportunity to ask questions, and be placed at ease. Indeed, the significance of clear guidelines to encourage accurate testimony in court seems essential<sup>332</sup>

Much has been done to improve the lot of the child and other vulnerable witnesses by the modification of the trial process in the making of special measures directions. However, unless the initial stage of investigation is conducted appropriately not only may the case fail to reach trial but even when it does the flaws in the way in which the evidence has been compiled may seriously undermine the effectiveness of any testimony received. The non-statutory code *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses* updated in 2011 produced on behalf of the Home Office and available from the Crown Prosecution Service was considered in Chapter 4. To formalise the procedures used to prepare for and obtain an interview capable of standing as pre-recorded evidence-in-chief, the guidance provides detail to ensure the practice and procedures result in an 'achieving best evidence' (ABE) interview. The guidance is designed to enhance the reforms made in the improvement of the trial process through the availability of special measures directions and to achieve a consistent approach towards the obtaining of interviews.

The guidance, while advisory and as such not a legally enforceable code of conduct, does carry considerable persuasive force in arguments as to the admissibility of pre-recorded evidence-in-chief. Departing from the guidelines will not of itself render the pre-recorded interview inadmissible.<sup>333</sup> Still, it may give grounds for an argument that the interview should be excluded either in whole or in part:

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<sup>332</sup> Wheatcroft J, *Witness assistance and familiarisation in England and Wales: The right to challenge* IJEP January 2017 21 2 (158)

<sup>333</sup> *Dunphy* [1994] 98 Cr.App R.78 DC.

The test for the admissibility of the video-recorded evidence was whether a reasonable jury properly directed could be sure that the witness had given a credible and accurate account on the videotape, notwithstanding any breaches of the guidelines.<sup>334</sup>

Other evidence in the case may well suffice to show that, while there have been breaches in the code, the credibility and reliability of the evidence are sufficiently unaffected to safely allow the interview to be admitted. Even in the absence of other evidence, the recording may be received if to do so would not prejudice the fairness of the trial from the point of view of the accused.

#### **5.4 A Case for Balance: A Fair Trial for the Accused**

Any reconsideration of the validity of the principle of orality as a starting point must take account of the need to achieve a fair trial. In the drive to achieve fairness for the child or otherwise vulnerable witness, it is of great importance to ensure a fair trial for the accused. To be wrongly convicted of any offence has grave repercussions and in considering the reforms to the principle of orality cases of the type often seen in the courts against children involving sexual or physical abuse must surely be the most harrowing of miscarriages of justice. Any prejudice to the defendant must be considered and a balance of the prejudice to the accused against the probative value of the evidence conducted in any argument as to admissibility. This balance regarding the use of pre-recorded examination-in-chief is clearly addressed in section 27 YJCEA 99 which considers the power of the court to decline to allow the whole of or part of the recording if it would not be in the interests of justice to do so:

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<sup>334</sup> *R. v K* [2006] EWCA Crim 472

the court must consider whether any prejudice to the accused which might result from that part being so admitted is outweighed by the desirability of showing the whole, or substantially the whole, of the recorded interview.<sup>335</sup>

Is it fair to allow a transcript of the recording to be used by the jury? This would be a departure from the principle of orality. In the course of live oral testimony it would not be the case that any such transcript would be available and the question is whether fairness to the accused is compromised in allowing a transcript when the evidence is pre-recorded. While an ABE interview conducted under the guidance will help towards providing a recording of sufficient quality to be followed, it is inevitable that the witnesses will often be difficult to understand owing to the quality of sound and pictures that can be achieved with a young child or vulnerable witness. In that situation, the judge may allow a transcript to enable the jury to follow the testimony rather than to enhance its weight and thereby lend inappropriate persuasive quality. This was the situation considered in *Springer*<sup>336</sup> where a child of nine gave evidence about a sexual assault alleged to have been committed when she was four. The argument to exclude was based on the premise that the child's evidence amounted to hearsay being an account provided to her by her mother. This legal argument in itself illustrates the prevalence of the principle of orality in basing the argument squarely on the need for first hand oral testimony. However, that argument failed, and the jury was provided with a transcript of the recording of her examination-in-chief to use during the viewing of the video. The judge did not give a direction on the value of the transcript to the evidence. An appeal was allowed with a re-trial on the basis that having properly allowed the recording to be admitted the judge had fallen short of the requirements to ensure a fair trial for the accused in not having given an appropriate direction on the use of the transcript. It is crucial that the jury understands that the evidence upon which they base findings of fact is the content of the recording with no additional weight lent to those parts in respect of which they had a transcript.

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<sup>335</sup> s27(3)

<sup>336</sup> *R. v Springer* [1996] Crim. L.R. 903 (CA (Crim Div))

Similarly, only with the consent of the defence should the jury be allowed to retire to deliberate with the transcript.<sup>337</sup> It would be most unusual for any witness to be re-called to give evidence. Even on the rare occasion when they might the purpose would not be to reiterate all that had been said before but to supplement and clarify on issues which had arisen unexpectedly. The question on a request from the jury to have the video replayed is whether this can ever be fair to the defendant when it amounts to the hearing of prosecution evidence twice. It is easy to understand why a jury may want a second viewing to enable them to follow how the child spoke and to gauge better the content of the testimony. Given the clear arguments on prejudice to the accused the Court of Appeal has given guidance that a replay should be allowed only in exceptional circumstances. In *Mullen*,<sup>338</sup> the playing of the video twice was recognised as a departure from the normal trial process. While appropriate to replay the video only in exceptional circumstances, it would be appropriate where the jury requested a replay to observe demeanour rather than to reassess the content of the testimony. This is permissible only when the conditions set out in *Mullen* are met. Those are that the judge should give an appropriate warning to balance the prejudice that may be caused to the defendant. It may render the trial unfair if the judge does not give an appropriate warning and should also allow the representatives from both sides to be present with a reminder to the jury of the points made in cross-examination.<sup>339</sup>

## 5.5 Article 6 of the ECHR – The Right to a Fair Trial

In *R. (on the application of D) v Camberwell Green Youth Court*<sup>340</sup> the question of whether the use of special measures could give rise to an argument under Art 6 ECHR, the right to a fair trial, was clearly dealt with. It was held that the special measure allowing the use of pre-recorded testimony did not breach the defendant's right to a fair trial. Art 6 requires that all evidence should be produced in the presence of the accused but that the

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<sup>337</sup> *R. v Welstead* [1996] 1 Cr. App R. 59 CA (Crim Div)

<sup>338</sup> *R. v Mullen* [2004] EWCA Crim 602

<sup>339</sup> *R. v Rawlings* [1995] 1 W.L.R. 178

<sup>340</sup> [2005] UKHL 4

modification of the normal trial process is a legitimate aim for the protection of witnesses.<sup>341</sup> In *Camberwell Green*, it was held that the use of the recording did not prevent the testing of the evidence and the recording was available for full consideration with the possibility of excluding it in whole or in part. It was clear that the court would not be in breach of Art. 6 by allowing special measures<sup>342</sup> and that the YJCEA 99 was compliant with the ECHR. It follows, therefore that the protection of the vulnerable or intimidated witness through available special measures directions is a legitimate aim and justifies the departure from Art 6 to an extent. The accused remains able to test the evidence and as such, the right to a fair trial is maintained to an acceptable standard. The mere fact that the cross-examination may take place at a later stage in the proceedings does not undermine the effectiveness of the process from the point of view of an accused wishing to challenge the testimony of a witness. The witness is merely enabled in the giving of testimony rather than the accused being barred from a proper test of its reliability and credibility. The fact that the witness must still be available for cross-examination if the pre-recorded examination-in-chief is to stand satisfies any Art 6 argument as confirmed in the *Camberwell Green* case.

The impact of the adversarial trial system and the principle of orality concerning all these considerations is clear. The entrenchment of the principle of orality and the constraints on the manner in which evidence may be obtained are pervasive throughout trial procedures. Numerous aspects of trial procedures have modifications to fix the unacceptable aspects which would otherwise result in insurmountable difficulties for some witnesses.

## 5.6 The Jeffrey Review

In May 2014 Sir Bill Jeffrey published his final report into criminal advocacy in the adversarial system of criminal justice<sup>343</sup> recognising that given advocacy is at the heart of

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<sup>341</sup> *Doorson v Netherlands* [1989] 22 E.H.R.R. 330

<sup>342</sup> *R. v SH* [2003] EWCA Crim 1208; Times, April 15, 2003

<sup>343</sup> Independent criminal advocacy in England and Wales: Jeffrey Review final report 7 May 2014

our system and its quality of pivotal importance. Considering the importance of the principle of orality in such a review of the whole premise of advocacy is based upon the three-stage process of testing live oral testimony. It is essential to understand the quality of advocacy is inextricably linked with the principle of orality and as such drives the trial system in its traditional format. The review recognises that the quality of advocacy in the English and Welsh criminal courts is of very significant interest to both government and the public. While commissioned by the Justice Secretary, its findings are of significance much more broadly across the profession. This is recognised in the Jeffrey report:

If hard facts about advocacy in the criminal justice system are difficult to come by, reliable information about its quality is even more elusive. There is remarkably little research evidence.<sup>344</sup>

Sir Bill Jeffrey considered the earlier 2009 quality assurance scheme for advocates research pilot<sup>345</sup> compiled by professors Richard Moorhead and Ed Cape. The troubling aspect of this research was that it found certain categories of cases in which advocacy skills were lacking. As a response to this, the quality assurance scheme for advocates was established (QASA) providing recognition of the level at which any adequate was competent practice. The scheme was supported by regulators and appeared popular with the profession.<sup>346</sup> An explanation for this is closely linked to the principle of orality and the adversarial nature of the traditional Anglo-American trial system. Sir Bill Jeffrey established that criminal barristers, together with some solicitor advocates, found themselves in the difficulty created by the traditional Anglo-American trial system and its adversarial nature in, on the one hand, meeting their clients' objectives, and on the other, conducting advocacy appropriate to the circumstances. This included cases in which victims of sexual offences and other vulnerable or intimidated witnesses may be involved. The Jeffrey review acknowledges the wide diversity of training amongst the different branches of the profession. Taking account of the requirements for the Bar Professional Training Course,

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<sup>344</sup> *ibid* at 2.1

<sup>345</sup> Legal Services Commission – Quality Assurance for Advocates – Moorhead and Cape Cardiff University Nov 2009

<sup>346</sup> Independent criminal advocacy in England and Wales: Jeffrey Review final report 7 May 2014 at para 2.12

the Legal Practice Course and the Chartered Legal Executives (CILEX) the differences in training requirements for the various branches of the profession are such that no common standard is currently being set. The Jeffrey review recommends a common training expectation for all those practising as advocates in the Crown Court.<sup>347</sup>

The effect of varying standards of those practising advocacy in demanding cases recognised in the Jeffrey review serves only to compound those issues highlighted by the Pigot report.<sup>348</sup> The lack of full implementation of the recommendations set out in the Pigot report link closely with adversarial trial practice. When considering a lack of implementation of all the recommendations set out in the Pigot report, it is notable that commentary to date does not appear to review the place of the principle of orality amongst the conclusions relating to the success of special measures. The impact of the principle of orality must surely fall to be considered having regard to the process of advocacy and the particular concerns relating to a lack of pre-recorded cross-examination in the years following initial reform.

## **5.7 Pigot Unfulfilled**

Following on from the initial success of special measures in dealing with the worst effects meted out on those most tested by the adversarial trial system, the anticipated conclusion of the process remained out of reach. After more than a decade it became increasingly apparent that the pre-recording of cross-examination was a fading hope in achieving a 'full' Pigot. Debbie Cooper<sup>349</sup> undertook a thorough review of the position in 'Pigot Unfulfilled: video recorded cross-examination under section 28 of the Youth Justice and Criminal Evidence Act 1999'. While recognising the value of all that special measures directions achieve the lack of implementation of section 28 is identified as particularly problematic in any move towards a better trial system. The problem is not simply the lack of an infrastructure, either in terms of training or technical support, to pre-record cross-examination but that without the bringing into force of section 28 the final piece in the

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<sup>347</sup> Independent criminal advocacy in England and Wales: Jeffrey Review final report 7 May 2014 at para 4.6

<sup>348</sup> Pigot, Judge T Report of the Advisory Group on Video Evidence HMSO 1989

<sup>349</sup> Cooper D, Crim L.R. 2005, Jun, 456-466

jigsaw, which would offer the prospect of a 'full' Pigot, is missing. A 'full' Pigot could be achieved with the implementation of section 28 in removing altogether the need to bring the vulnerable witness to the trial itself by having captured the full testimony, rather than the half available in examination-in-chief, at a preliminary hearing away from the court. The existence of section 28 in the YJCEA 99 stood as a tantalizing opportunity to reach a stage when the worst of the trial experience could be avoided for those witnesses most in need of protection. The prospects for section 28 did not appear good in 2005 and, although never abandoned altogether, the section remains without a date for full implementation. Initial pilot schemes have been run,<sup>350</sup> and a larger roll-out<sup>351</sup> proved workable resulting in encouraging judicial guidance, setting out detail for its use.<sup>352</sup> The guidance covers pre-trial planning so that before the case reaches court complainants who are eligible for special measures under s28 can be identified and appropriate monitoring and supervision set up<sup>353</sup> putting the use of pre-recording in the frame before the ground rules hearing.<sup>354</sup> Debbie Cooper certainly found the position in 2005 disappointing and the slow but eventual roll out of pilot schemes has raised a more realistic expectation that significant progress is on the horizon.

It must be recognised that the bringing into operational force of section 28 does not of itself ensure a panacea for the ills of court procedures as experienced by the vulnerable or intimidated witness. Even a confident adult witness would be hard pressed to deal with all that may arise in terms of the content of testimony at an early preliminary stage. It is inevitable that those vulnerable witnesses who have pre-recorded testimony will, on occasion, need to deal with supplementary questions by the time the trial is reached. The difficulty with this is that the adversarial trial system does not embrace the acquisition of testimony on a piecemeal basis. However, to develop properly a system of special measures which would allow the pre-recording of testimony, including cross-examination,

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<sup>350</sup> Section 28 Pilot HM courts and tribunal's service 28<sup>th</sup> of July 2014

<sup>351</sup> Extending the roll out to Leeds, Liverpool and Kinston Crown Courts

<sup>352</sup> Courts and Tribunal Service Guidance on the use of s.28 YJCEA 1999; pre-recording of cross-examination and re-examination for witnesses captured by s17(4) YJCEA 1999 30 September 2019

<sup>353</sup> *ibid* at para 4

<sup>354</sup> Courts case management powers Criminal Practice Direction V Evidence 18E Criminal Practice Directions 2015 Amendment No.5 2017 EWCA Crim 1076

there would need to be a system whereby the evidence could be added to on a supplementary basis. This concept is entirely at odds with the principle of orality. Rather than questioning why the principle must be adhered to from the outset constructing something entirely more appropriate for the 21<sup>st</sup>-century system of fact finding, modifications continue but without having achieved any satisfactory conclusion in almost 30 years.

Another significant problem in leaving section 28 without full implementation is the time delay between the pre-recorded examination-in-chief and the cross-examination taking place at the time of the trial. Debbie Cooper acknowledges the serious issue of vulnerable witnesses facing the trauma of cross-examination cold at the time of the live trial some considerable time after the pre-recording of examination-in-chief:

When video-recorded evidence-in-chief was first introduced, one of the main criticisms voiced by practitioners was that the child was required to go into cross-examination without the benefit of a “friendly warm-up” from prosecuting counsel.<sup>355</sup>

Debbie Cooper also recognises that to remove the final stage of testimony from the court room to a time much closer to the events in question would serve to improve reliability. However, while achieving more credible and reliable evidence is a legitimate aim, the clear winner in removing the process of cross-examination from the live trial in court to a procedure undertaken at a much earlier stage in a less traumatic and stressful environment would be the vulnerable witness. While recognising the compelling argument to move away from the recognised system of testing evidence, Debbie Cooper does not advocate more fundamental review of why adherence to the principle of orality is the best way forward. It is all very well to recognise that reform is necessary. A more fundamental review of the place of the principle of orality across the litigation landscape may be asking too much of a system entrenched to the extent seen currently. Fixing the problems within the structure rather than rebuilding the structure has been the focus.

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<sup>355</sup> *ibid* at 462

This approach was seen in the child witness review, which was announced by the Government in 1984 but only produced a consultation paper in June 2007.<sup>356</sup> The specific issues relating to pre-recorded cross-examination stand out as the most controversial. Numerous pilot schemes were announced and then withdrawn,<sup>357</sup> and the Government announced that the section would not be implemented in its current form but would be reviewed in the consultation process. This decision was taken based on the Birch Report,<sup>358</sup> which concluded that having regard to the increasingly more complex disclosure regime within criminal procedure it would be difficult to conduct cross-examination a long time before the trial. The Birch Report tended towards removing delays within the system of criminal justice to bring cases involving children to court swiftly and thereby reducing trauma without the need for pre-trial cross-examination. However, the conclusion of the Birch Report has been criticised in underestimating the benefits of pre-trial cross-examination and perhaps in having assessed the difficulties in overcoming procedural problems to be greater than they would be in reality.<sup>359</sup> The experience of other jurisdictions such as Australia and the USA suggests that procedural problems can be met and the pre-recording of cross-examination serve the purpose envisaged by Pigot et al in reducing the trauma for vulnerable witnesses while maintaining a fair trial process.<sup>360</sup>

It is deeply regrettable that the extensive experience of Australian and American jurisdictions with pre-trial cross-examination was not tapped by the *Birch Report* nor by the Review Group. The change in legal culture necessary to make “full-Pigot” work is even more unlikely to happen now.<sup>361</sup>

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<sup>356</sup> Improving the Criminal Trial Process for Young Witnesses: A Consultation Paper 2007

<sup>357</sup> Home Office Press Release 17/2002 and Circular 058/2005

<sup>358</sup> Birch, R and Powell, R Meeting the Challenges of Pigot: Pre-trial Cross Examination under s.28 of the Youth Justice and Criminal Evidence Act 1999

<sup>359</sup> Hoyano, L The Child Witness Review: Much ado about too little Crim LR 2007

<sup>360</sup> Hoyano, L Variations of a theme by Pigot: Special measures Directions for Child Witnesses Crim LR 2000 at pp 268-271

<sup>361</sup> *ibid* 7 at p 856

As long ago as 2009, the Government Response to the Improving the Criminal Trial Process for Young Witness Consultation<sup>362</sup> gave answers to the questions posed in the consultation exercise, the first of which was:

***“Do you agree that section 28 should be retained and implemented for the cross-examination of the most vulnerable witnesses if this is the only way in which they would be able to give evidence?”***

The overwhelming response to the consultation exercise was that section 28 should be retained, but it was recognised that very significant hurdles would need to be overcome for implementation to occur. Amongst the particular difficulties identified were ensuring sufficient disclosure to allow early cross-examination; practical issues of having the parties available and appropriate arrangements for the defendant and other witnesses together with the need for supplementary issues arising later to be dealt with. Solutions were suggested, including the early appointment of a trial judge to take control and clear guidance in the form of protocols supported by appropriate training. While the Bar Association and some academics expressed reservations on the use of pre-recorded cross-examination it was considered appropriate to draw to some extent on the experience of other jurisdictions. Most notably Western Australia, where the difficulties had been overcome and pre-recording used to good effect.<sup>363</sup>

However, section 28 remains in the frame and is progressing, if, at a slow rate given the intervening years, Laura Hoyano’s comment on its position in 2007 sums up the progress made at that earlier stage:

whilst the recommendation to retain the availability of pre-trial cross-examination in extreme circumstances is preferable to wholesale repeal, it is very likely that s.28 will remain an aspiration rather than an achievement in accommodating the most

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<sup>362</sup> Office For Criminal Justice Reform 2009

<sup>363</sup> *ibid* at para 1.11

vulnerable witnesses<sup>364</sup>

The value of continuing pilot cases in a movement towards a possible roll out of s28 was illustrated in *R v RL*<sup>365</sup> in which appeal was refused on the point of the extent to which a judge could restrict nature of questioning in relation to children. This particular case involved a registered intermediary; however, the value of moving away from the traditional adversarial trial system towards more suitable mechanisms for obtaining evidence was illustrated to good effect. The judge, partially by reference to a toolkit issued by the bar training Council,<sup>366</sup> significantly reduced questions considered to be unnecessary and repetitious. The value of such careful consideration of the impact of the adversarial trial system is clearly important in that a continued evaluation of its place in determining the outcome of trials within the criminal justice system.

## 5.8 A Fair Test

Standards of cross-examination are intrinsic to the principle of orality. They must be considered in any evaluation of adjustments made to accommodate the needs of the vulnerable or intimidated witness in the common law adversarial system. The accepted norm is that cross-examination is how the veracity; reliability and credibility of the witness can be checked. Inconsistencies are highlighted and the opposing arguments put to the witness through this medium. The advocate has a duty to represent the interests of the party on whose behalf instructions have been given. The problem of the role of the advocate was recognized in the findings of Home Office research presented in the *International Journal of Evidence and Proof*:

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<sup>364</sup> Hoyano, L 'The Child Witness Review: Much ado about too little' (2007) *Crim LR*

<sup>365</sup> *R v RL* [2015] EWCA Crim 1215

<sup>366</sup> Ground Rules Hearings and the Fair Treatment of Vulnerable People in Court Toolkit 1 Advocacy Training Council July 2015

The Code of the Bar Council of England and Wales contains an inherent conflict between the barrister's duty to her client and to the court, limiting the Code's effectiveness in this respect.<sup>367</sup>

It has long been acknowledged that judges must take steps to intervene when a witness needs to be protected<sup>368</sup> from inappropriate questioning. Still, the reality of the orthodox trial system is that any interventions may be open to appeal:

judges rightly fear that if they over-step the mark, defendants will successfully appeal against conviction on the grounds that the jury was denied the right to hear the prosecution witness adequately put to the test.<sup>369</sup>

It would appear that a significant area of concern is not just the lack of pre-recorded cross-examination across the board but a system in which key principles in the testing of evidence involve a standard of questioning unsuitable in the context of vulnerable and intimidated witnesses. The extent to which the suitability of the approach can be modified is open to debate. However, unless tackled, special measures directions alone cannot create a climate that will enable the giving of evidence by those witnesses least able to withstand the techniques employed in traditional cross-examination aimed at discrediting and casting doubt on veracity.

## **5.9 No Way to Speak to a Child: Ensuring Appropriate Questioning at Court**

Standards of cross-examination have been seen as an issue for vulnerable witnesses and highlighted as in need of reform in numerous empirical studies.<sup>370</sup>

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<sup>367</sup> Burton, M Evans, R Sanders, A 'Are special measures for vulnerable and intimidated witnesses working?' (2006) Home Office

<sup>368</sup> *R v Brown (Milton)* [1988] 2 Cr App R 364

<sup>369</sup> *ibid* 13

<sup>370</sup> Plotnikoff, J and Woolfson, R 'In their own words: The experiences of 50 Young Witnesses in Criminal Proceedings' (2004) NSPCC and Hamlyn, B Phelps, A Turtle, J and Satter 'Are Special measures Working? Evidence for surveys of vulnerable and intimidated witnesses' (2004) Home Office Research Study No 283

The Measuring Up report<sup>371</sup> highlighted how frequently young people felt unable to cope with difficult cross-examination. Of those young people interviewed for the Measuring Up report forty-nine per cent were not able to understand questions in cross-examination; 65 percent found the questions too fast, and complex to follow and 20 percent felt they had been unable to tell the court all that they wanted to say. Overall, those surveyed found words were put into their mouths, and that questioning was repetitive and lacked a logical order. It is not that the Bar Council and Criminal Bar association have failed to make training available in the handling of vulnerable witnesses. Great efforts have been made by the Bar and Crown Prosecution Service to improve the situation in the training of those counsel likely to be involved in such cases.<sup>372</sup> The earlier efforts were recognised in the child witness review,<sup>373</sup> and the Inns of Court College of Advocacy continue to publish guidance with a series of toolkits linked to the 'Raising the Bar' report. The earlier observations suggested much remained to be done,<sup>374</sup> and the continued development of professional standards is key.

Public awareness of the distressing circumstances of the 'Baby P' related case of Barker<sup>375</sup> prompted a critical evaluation of the process of cross-examination in the Times "Sarcastic, Rude: is this the way to question child witnesses?"<sup>376</sup> Published in July 2009, years after numerous papers and articles highlighting the problem, the case brought the matter to the attention of a wider public in the most graphic terms imaginable. The young girl, still two at the time of her horrendous sexual assault and the youngest victim to give evidence, at age four, was said to look distressed and perplexed under cross-examination, finally lapsing into silence. The Times article undertook a brief review of important studies, such as the Measuring Up report and concluded:

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<sup>371</sup> Plotnikoff, J Woolfson, R 'Measuring Up? Evaluating the implementation of Government commitments to young witnesses in criminal proceedings' (2009) NSPCC

<sup>372</sup> 'Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court' (2011) Advocacy Training Council

<sup>373</sup> *ibid* 4

<sup>374</sup> Plotnikoff and Woolfson 'Cross-examining children - testing not trickery' (2010) Archbold Review

<sup>375</sup> *R. v B* [2010] EWCA Crim 4

<sup>376</sup> The Times July 2, 2009

One way to keep children out of the courtroom would be through pre-recorded cross-examination, recommended 20 years ago by the Pigot Report and included in the Youth Justice and Criminal Evidence Act 1999.

This conclusion certainly accords with earlier evaluation of the importance of section 28 in the bringing in of pre-recorded cross-examination. Still, it does take a rather simplistic approach to the ease with which it suggests this may be achieved. Similarly, the difficult issue of standards of cross-examination is dealt with in a manner designed to simplify the really very complex practical and ethical issues at stake in changing attitudes and approaches to cross-examination:

Defence barristers are duty-bound to put their client's case and you have to employ the legitimate tools of cross-examination, such as seeking to contradict a witness or catch them out." But, he accepts, barristers should avoid bad practices. "Cross-examination is not the art of asking questions crossly."<sup>377</sup>

A more erudite analysis of the Barker case can be found in J.R Spencer's case comment<sup>378</sup> in which the upholding of the conviction by the Court of Appeal of a man's anal rape of the very young victim is considered. A startling aspect of the conviction was that the evidence boiled down to the little girl's own account told some time later to those charged with her care. That a conviction was secured, and subsequently upheld, based on the evidence of one so young is to be celebrated in the drive towards achieving justice for vulnerable victims so often unable to meet the challenges of giving evidence. However, the standard of questioning observed in the case is not to be celebrated. Spencer observes:

when viewed in its broader context the decision also shows that there is still much amiss in the way the criminal justice system deals with little children who have the misfortune to be witnesses.<sup>379</sup>

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<sup>377</sup> *ibid* Quoting Paul Mendelle QC

<sup>378</sup> Spencer, JR 'Children's evidence: The Barker case and the case for Pigot' (2010) Archbold Review

<sup>379</sup> *ibid* at p5

It seems that when a child is called to undergo cross-examination that it is this stage of the whole process that may be the most difficult to bear. The question most in need of consideration is, why is this stage so fundamentally entrenched? This is the question addressed from the outset of this thesis. The traditional view that witnesses lack credibility unless they have satisfactorily performed in a live oral rendition of their perception of the events at issue in the case forms a central question in the analysis of the place of the principle of orality in the traditional adversarial trial system. In this instance, the human effect of that principle can be seen in that the witness is forced to relive the horrendous events about which they have already spoken in the obtaining of pre-recorded examination-in-chief. In this respect, the modifications of the principle of orality seen in the special measures directions may serve to intensify rather than ameliorate the process of testing based so firmly on the adversarial trial process. The fresh and quite radical approach proposed by the Pigot report that all this information should be obtained outside the constraints of the trial setting has not been realised. Arguably the half measures brought into effect over the following two decades, while serving to improve many aspects of the experience for witnesses, created an additional process in separating evidence in chief from cross-examination.

### **5.10 Testing not Trickery**

Considerable progress was made in the guidance produced in conjunction with the Crown Prosecution Service by the NSPCC in its publication 'Good practice guidance in managing young witness cases and questioning children'.<sup>380</sup> The guidance sets out common sense approaches to the questioning techniques most suitable for use with children. It is clear that the growing recognition of the different needs of children is making a real impression, and there is a growing expectation that advocates will moderate the traditional approach accordingly. The Inns of Court College of Advocacy promote these standards and have been acknowledged in October 2018 by the Ministry of Justice in the updated Victims

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<sup>380</sup> Plotnikoff and Woolfson [www.nspcc.org.uk/inform](http://www.nspcc.org.uk/inform) 2009

Strategy as having exceeded previous expectations.<sup>381</sup> It is marked progress when considering that in June 2010 Woolfson and Plotnikoff commented<sup>382</sup> on the issues discussed at a young witness seminar chaired by Lord Hooper. The tension between the techniques used to achieve the aims of cross-examination and the needs of vulnerable witnesses was accepted. Concepts such as ‘putting the case to the witness’ are the norm in offering the witness the opportunity to address issues forming the case of the opposing party. Such concepts do not work well with children, and the guidance is clear in stating that phrases commonly used in the adversarial system such as “I suggest to you” are not suitable for use with children. The seminar raised the issue that testing evidence so as to ensure a fair trial does not mean trickery and the move towards developing appropriate questioning provides a way forward.

The need for training across the range of professional advocates is clear. Recognition of the issues, and the publication of clear guidance, is to be strongly encouraged the lack of implementation of the ‘full’ Pigot across all courts endures as a bar to a real alternative to the current system. Woolfson and Plotnikoff conclude that the introduction of pre-recorded interviews by the bringing into force of section 28 would be the most expedient means by which a better alternative could be established. The contention is plainly put that the evidence could be taken in advance in a manner that is compliant with the right to a fair trial under Art 6. Issues with disclosure can be overcome, and cross-examination supplemented at a later stage should the need arise.<sup>383</sup> Should the aspirations of Woolfson and Plotnikoff be realised, the prospect of a ‘full’ Pigot may finally emerge from the current pilot run out.

The special measures introduced under the Youth Justice and Criminal Evidence Act brought a range of features to enhance the experience of vulnerable and intimidated witnesses on a previously unseen scale. However, while there can be no doubt the special measures introduced went a long way towards achieving a better landscape in the

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<sup>381</sup> Victims Strategy Published September 2018 CM 9700

<sup>382</sup> *ibid* 19

<sup>383</sup> *ibid* 25

adversarial process, equally, there is no doubt that difficulties were soon identified. These difficulties link to the entrenchment of the principle of orality and the difficulty of addressing such a fundamental aspect of truth finding.

Initial reaction to the reforms proved a cautious welcome. As far back as 1991,<sup>384</sup> Professor Jennifer Tempkin, a member of the Pigot Committee, commented on the progress made towards achieving the central recommendations arising from the report of the Pigot advisory group.

Tempkin summarises the approach of the government clearly and succinctly:

The Government's rejection of the idea of the preliminary hearing has been greeted with dismay by psychiatrists, social workers, police and crown prosecutors who regularly deal with child abuse cases. Child witnesses in sexual abuse trials are all too often put through the mill and doubly traumatised.<sup>385</sup>

While much has been recognised in the context of vulnerable and intimidated witnesses by following the thread of the principle of orality through civil litigation and the place of experts in the general litigious landscape, the continuing impact of a system anchored by tradition can be demonstrated. The reason why the impact of the principle of orality is considered in so much detail in relation to this particular category of witness is because the extent of human damage has resulted in pressing calls for continuing reform. Following the 'Speaking up for Justice'<sup>386</sup> report, the Youth Justice and Criminal Evidence Act sought to address much of the early concerns in the gathering and presenting of evidence from vulnerable witnesses. However, the hope for a trial process conducted in such a way as to give a voice to all witnesses was overshadowed by concerns relating to the unduly complex

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<sup>384</sup> Tempkin, J 'Doing Justice to Children' (1991) 141 NLJ 315

<sup>385</sup> *ibid* 1

<sup>386</sup> Home Office 1988

wording of the 1999 Act and practical difficulties with implementation on a national scale.<sup>387</sup>

In a continuing process to address concerns voiced by those participating in the justice system, criminal practice directions have been reviewed and updated to reflect the need to deal with children and other vulnerable witnesses more sympathetically. In fact, the need to enable all witnesses to give best evidence they can has been recognised in the rules.<sup>388</sup> This follows on from the guidance provided by the earlier Judicial College Bench checklist: Young Witness Cases<sup>389</sup> which deals with the appropriate steps to be taken at an early stage to ensure proper case management both in the magistrates' court and in the Crown Court. In determining how evidence can best be given matters such as the child's ability to give evidence having regard to general health and the ability to deal with complex questions will be considered. It is seen as important to establish an appropriate a set of 'ground rules' for the running of proceedings from the outset. These principles have been developed and appear in the criminal practice directions at paragraph 18E:

18E. It is particularly important in the case of a child witness to keep a question short and simple, and even more important than it is with an adult witness to avoid questions which are rolled up and contain, inadvertently two or three questions at once. It is generally recognised that, particularly with child witnesses, short and untagged questions are best at eliciting the evidence. By untagged we mean questions that do not contain a statement of the answer which is sought. That said, when it comes to directly contradicting a particular statement and inviting the witness to face a directly contradictory suggestion, it may often be difficult to examine otherwise.<sup>390</sup>

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<sup>387</sup> Hamlyn, B Phelps, A Turtle, J and Satter Are Special measures Working? Evidence for surveys of vulnerable and intimidated witnesses, Home Office Resreach Study No 283 (2004)

<sup>388</sup> Courts case management powers Criminal Practice Direction V Evidence 18E Criminal Practice Directions 2015 Amendment No.5 2017 EWCA Crim 1076

<sup>389</sup> Judicial College Bench Checklist: Young Witness Cases 2012

<sup>390</sup> Criminal Practice Directions 2015

## 5.11 The Approach of the Bar

The Bar is the profession with the greatest vested interest in the future of the adversarial trial system across all aspects of litigation. Counsel are recognised as those advocates formally trained and called to the Bar of England and Wales, reporting to the Council of the Inns of Court.<sup>391</sup> The inculcation of an understanding of the limitations of the adversarial trial system based on the principle of orality from the outset and on a continuing basis has been acknowledged as an invaluable way forward in bringing about reform and improvements to the trial process.<sup>392</sup> The improvements that have been made in the training of barristers shed light on those issues which continue to be dealt with by modification and reform rather than a more fundamental restructuring of the system. However, this acknowledgement and strategy to improve the process needs to be considered in any analysis of the current system.

The Advocacy Training Council acknowledges the pre-eminence of the principle of orality, and its importance in the current system sets the tone in its training literature:

The first-hand account of what a witness saw, heard and experienced is vital in all fact-finding hearings – be it in court, tribunal or panel. Direct oral evidence gives a legitimacy to legal proceedings that can be delivered in no other way. The effective testing of that evidence is an essential part of the proper administration of justice, and crucial to a fair trial.<sup>393</sup>

Over the past 20 years or so, an increasing number of cases have reached the courts which in the past would have failed either to generate an actionable complaint to the police, or to satisfy the prosecuting authorities that there was a realistic prospect of a conviction. This welcome advance is in part the result of a change in legislative and

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<sup>391</sup> The joint body for the four Inns of Court

<sup>392</sup> 'Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court' (2011) Advocacy Training Council

<sup>393</sup> 'Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court' (2011) Advocacy Training Council at para 2.8

procedural provisions enabling vulnerable witnesses to give evidence by the use of special measures.<sup>394</sup>

Inherent in the process of questioning of witnesses is cross-examination. Cross-examination is seen as pivotal in the advocates as this is how credibility, or the lack of it, as demonstrated. In the drive to achieve the best outcome for those instructing on the matter, barristers are at risk of overlooking the importance of recognising the needs of vulnerable and intimidated witnesses. It is of recognised importance to the professionalism of the bar that misconceptions about the work of advocates are met:

A growing body of work is being undertaken to assess and improve the lot of vulnerable witnesses and defendants, particularly in enabling them to give evidence to the best of their ability . Whilst this work deserves wider dissemination, some research may not be easily accessible, or readily absorbed into an advocate's practice - particularly without an understanding of both its underlying rationale and its practical impact. Misconceptions both within and about the Bar by those engaged in these issues must be challenged.<sup>395</sup>

The whole premise of the adversarial trial system may appear to be about seeking an advantage for the side represented and from whom instructions are received. However, while this may have been the prevailing drive of the profession historically, its current code of conduct emphasises the importance of the duty to act in the interests of justice. Aggressive advocacy ought not to have a place in meeting the objectives of the underpinning framework concerning the conduct of practising barristers:

302 A barrister has an overriding duty to the Court to act with independence in the interests of justice: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.

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<sup>394</sup> at para 2.11

<sup>395</sup> at para 2.13

303 A barrister:- (a) must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including any professional client or other intermediary or another barrister);

307 A barrister must not: (c) compromise his professional standards in order to please his client, the Court or a third party, including any mediator.<sup>396</sup>

It follows that advocates ought not seek to gain an advantage by exploiting the vulnerability of witnesses but ought to adjust their practice to meet the requirements of proper assistance to the court in the administration of justice. The establishment of the vulnerable witnesses and defendants handling working group by the advocacy training Council in 2009 sought to bring about change in the training of barristers. Again, the principle of orality is acknowledged in the report, Raising the Bar, and links closely with the task of the working group:

the friction between the philosophy of those seeking to protect vulnerable people from questioning which undermines and challenges their evidence, and the need in an adversarial system for controversial parts of that evidence to be effectively tested in the interests of a fair trial.<sup>397</sup>

In a litigious landscape, the principle of orality continues to shape the evolution of the trial system. Increasing complexity and modifications have resulted in the need to acknowledge and adjust training patterns for advocates. The very complex issues arising in specialist trials have changed the role of the judge whose pivotal position in the running of the adversarial trial system cannot be underestimated. Notwithstanding the training given to those more junior members of the advocates profession, judicial training must maintain pace to ensure that the modifications to how evidence is received work in the interests of justice. It is recognised that judges will be required to play a more interventionist role

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<sup>396</sup> Bar Standards Board Handbook Code of Conduct of the Bar of England Wales Part III: Fundamental Principle 2014

<sup>397</sup> 'Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court' (2011) Advocacy Training Council at para 2.18

taking steps to ensure a fair trial for all parties, including victims, other witnesses and defendants. The role of the judiciary to ensure fair and proper access to justice requires a range of skills, including an understanding of current society.<sup>398</sup> The judge should not assume a juror's understanding of modern British society and work on the basis that the disparate nature of those finding themselves within an archaic, historically-based system is not readily understood.<sup>399</sup> It has long been acknowledged that judges must take steps to intervene when a witness needs to be protected<sup>400</sup> from inappropriate questioning. However, the reality of the orthodox trial system is that any interventions may be open to appeal:

judges rightly fear that if they over-step the mark, defendants will successfully appeal against conviction on the grounds that the jury was denied the right to hear the prosecution witness adequately put to the test.<sup>401</sup>

It would appear that a significant area of concern is not just the lack of pre-recorded cross-examination but a system in which key principles in the testing of evidence involve a standard of questioning unsuitable in the context of vulnerable and intimidated witnesses. The extent to which the suitability of the approach can be modified is open to debate. However, unless tackled, special measures directions alone cannot create a climate that will enable the giving of evidence by those witnesses least able to withstand the techniques employed in traditional cross-examination aimed at discrediting and casting doubt on veracity. The Bar Training Council has done much to address the situation in the provision of Toolkits, brought in as part of the 2011 Raising the Bar Report, and updated in December 2015. Following on from Raising the Bar in 2011, the rapidity with which the Advocacy Training Council has developed and sought to address professional practice through its Advocate's Gateway<sup>402</sup> demonstrates growing recognition by the key players engaged in its output (inter-alia the Criminal Bar Association, the Crown Prosecution Service, the Law

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<sup>398</sup> *ibid* at chapter 17

<sup>399</sup> at para 17.2

<sup>400</sup> *R v Brown (Milton)* [1988] 2 Cr App R 364

<sup>401</sup> Burton, M Evans, R Sanders, A 'Are special measures for vulnerable and intimidated witnesses working?' (2006) Home Office

<sup>402</sup> <http://www.theadvocatesgateway.org/> accessed 9 December 2019

Society, Judiciary of England and Wales) that there is a movement towards significant improvement in the training of those at the forefront of advocacy. There are currently 18 toolkits produced in response to the recommendations of the Advocacy Training Council providing advocates with guidance on good practice in their preparation for trial in specialist areas involving witnesses with particular requirements in terms of communication needs. Standards of cross-examination have been seen as an issue for vulnerable witnesses and highlighted as in need of reform in numerous empirical studies<sup>403</sup> on the development of specialist toolkits to support and guide those most closely involved in the process. This is a positive development. However, what is not addressed by changing training is the fundamental premise that the receipt of oral testimony through the traditional embedded means is the best starting point.

## 5.12 The Broader Legal Community

The approach of the Bar to the training requirements relating to the questioning of vulnerable witnesses has been picked up in the broader legal community. Solicitor advocates may also question vulnerable witnesses in court during criminal trials and, together with their counterparts at the bar, undertook bespoke training from 2018:<sup>404</sup>

Victims and witnesses who feel secure in the court room or more likely to communicate vital evidence effectively.<sup>405</sup>

It is self-evident that mandatory training for publicly funded advocates questioning vulnerable witnesses participating in trials for serious sex offences can only be a positive step. However, there is no acknowledgement of the failure to implement all the proposals

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<sup>403</sup> Plotnikoff, J and Woolfson, R 'In their own words: The experiences of 50 Young Witnesses in Criminal Proceedings' (2004) NSPCC and Hamlyn, B Phelps, A Turtle, J and Satter 'Are Special measures Working? Evidence for surveys of vulnerable and intimidated witnesses' (2004) Home Office Research Study No 283

<sup>404</sup> The Law Society press release 14 November 2016 'New training for lawyers to improve courtroom experience of vulnerable witnesses'

<sup>405</sup> Law Society president Robert Bourne

in the Pigot report with the focus continuing to be a modification of the principle of orality rather than the fresh starting point proposed by Pigot three decades earlier.<sup>406</sup> There is a clear acknowledgement of the progress made in the treatment of vulnerable witnesses but no question whatsoever as to the appropriateness of the system. The approach to the plight of vulnerable witnesses from the Law Society and Bar Training Council appears to be found in modifications to the experience in court through the training of advocates. The suitability of the approach through the receipt of oral evidence consistent with the principle of orality does not appear to be at the heart of the professional debate:

While significant progress has been made over the past 2 decades to support vulnerable witnesses during a trial, more can be done. That is why the Law Society is committed to supporting a consistent level of high-quality advocacy. Stress can affect the ability of a witness to tell their story in a court room. This training program ensures that solicitor advocates and barristers play their part in helping witnesses so they are best able to communicate their evidence. We look forward to working with the bar Council to develop and deliver this training.<sup>407</sup>

### **5.13 Conclusion**

Taken together with Chapter 4, the issues considered above look at the following research aims:

- To identify the continued effectiveness of the principle of orality as the most appropriate means for defining and safeguarding a fair trial.
- To propose continuing review of a model for effective receipt of testimony, together with continuing evolution of the trial system in coming years.

The reforms considered demonstrate an emphasis on developing fairness in continuing reform. It is not contended that those reforms and modified mechanisms be abandoned. Rather the developments form part of a framework when considering the most

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<sup>406</sup> Pigot, Judge T 'Report of the Advisory Group on Video Evidence' (1989) HMSO

<sup>407</sup> *ibid* 88

appropriate methods for receipt of evidence. The principle of orality remains part of those methods. It is contended that in moving forward a model allowing for systems built to match 21<sup>st</sup> century fact finding become less hampered by the principle that the starting point is the receipt of oral testimony contemporaneous with the trial. This does not shift to an entirely inquisitorial approach but allows for adversarialism as a means to achieve a fair outcome rather than requiring those engaged in the system to achieve an outcome favourable to the instructing party at all costs. This is not a new notion and was acknowledged following the introduction of the 1836 Prisoner's Counsel Act which introduced the right of the accused to a defence team:

The recurring criticisms in the press of forensic morality prompted an examination in legal literature of the duties of counsel. Some lawyers, particularly Lord Brougham, advocated an uncompromisingly adversarial conception of the duties of counsel which made commitment to the client the first forensic virtue and demanded that counsel exploit all expedient means to obtain the verdict. The predominant view was that there were moral qualifications on counsel's duty to his client, but the limits of adversarialism under this view were difficult to identify with precision.<sup>408</sup>

The aims identified in these chapters support the research objective; is the principle of orality the most appropriate means for defining and safeguarding a fair trial in the context of particular categories of witness? Chapter 6 draws conclusions to support the proposal that systematic reform can be achieved with policy and bold movement towards implementation of new structures.

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<sup>408</sup> Cairns, D *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* OUP, 1999 at Chapter 6 'the limits of adversarialism'.

## CHAPTER 6 - CONCLUSIONS

The previous chapters consider the impact of the principle of orality across both civil and criminal proceedings. In terms of the research question and aims of this thesis, the concluding chapter will draw the common threads together to demonstrate the effect of adherence to the principles underpinning trial procedures. The drivers of change are demonstrably dependent on the nature of the proceedings. This thesis considers the broad swathe of issues arising across the litigation landscape with each 'fix' being developed to address problems as they are identified rather than emanating from a systematic and planned review of the overall means by which evidence is received. This thesis draws the research question and aims<sup>409</sup> through considering each in relation to a key aspect of the litigation process:

- (1) To determine the original purpose/remit of the principle of orality.
- (2) To establish the potential consequences of the modifications of that principle.
- (3) To identify the approach of the English adversarial trial system and any change to the approach over time.
- (4) To consider the legitimacy and effect of any change in the approach to the principle of orality.
- (5) To identify the continued effectiveness of the principle of orality as the most appropriate means for defining and safeguarding a fair trial.
- (6) To propose continuing review of a model for effective receipt of testimony, together with the ongoing evolution of the trial system in the coming years.

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<sup>409</sup> see summary above

## 6.1 The Original Purpose of the Principle of Orality

The pre-eminence of the principle of orality as the cornerstone of the trial process is considered in Chapter 1. The justification for the prominence placed upon oral evidence was found to be in part because of historical factors and the perception, created to some extent by popular culture, that the oral performance of witnesses and lawyers is decisive. Given that background, combined with a legal profession that has been schooled in the same thinking and immersed in a system reinforcing those views, it is unsurprising that challenges to oral evidence as the decisive factor have sometimes struggled to gain ground.

Having regard to the long-standing significance of the receipt of oral testimony, any move away from the traditional approach of testing in open court to date has been hard won. But attitudes have begun to shift. While it may be that people still view a legitimate system as one that emphasizes oral testimony, the underlying reason is a belief in that process as the 'best' way of finding the truth in most situations. As it becomes increasingly apparent that such a belief is open to challenge, so too are views on just how legitimate significant reliance on oral evidence is. Even in popular culture, so prominent has coverage of the true impact become that television dramas now emphasise the impact of hard questioning, vulnerability of some people, and how witnesses, both expert and lay, may either be overly relied upon or ignored simply because of their confidence and ability to perform.

The crucial role afforded in the past to oral testimony in trial proceedings failed to recognise the experience of the witness, the court time necessary to play out the full process of questioning and, most notably in civil proceedings, the associated financial cost. The historical roots of the system<sup>410</sup> lead to the primacy of oral evidence owing to the nature of adversarial proceedings. The triers of fact are not given advance documentation to form a view but must come to the proceedings cold and draw all conclusions from that

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<sup>410</sup> see Chapter 1 above

which is placed before them. This lack of a preliminary document base for those deciding the facts differentiates the traditional Anglo-American trial system from its inquisitorial counterparts. The greatest departure from the adversarial system towards increased inquisitorial decision making can be seen in the civil litigation landscape. The advent of the civil procedure rules<sup>411</sup> drove through significant modifications but not a complete departure from the principle of orality. The continuing effect of modification will be considered at 6.2 below.

The preceding chapters analyse the initial starting point for the determining of facts and consider how reforms have affected the pre-eminence of long embedded values. This thesis illustrates how the slow process of modification is making an impact in civil proceedings,<sup>412</sup> the place of expertise in providing an opinion to the triers of fact from which a conclusion may be drawn<sup>413</sup> and most notably concerning vulnerable witnesses.<sup>414</sup>

## **6.2 Further Developments in Civil Proceedings and the Drive Towards Online Systems**

In considering to what extent the potential consequences of the modifications of the principle of orality affect the administration of justice, the greatest dismantling of the traditional trial system can be seen in civil proceedings.<sup>415</sup> However, while those reforms have brought a much greater emphasis on proportionality and corresponding case management through track allocation,<sup>416</sup> a far greater departure from the principle of orality is planned.<sup>417</sup> Lord Justice Briggs preceded the publication of his final report, Civil Courts Structure Review: Final Report Lord Justice Briggs July 2016, with articles delivered to practitioner journals<sup>418</sup> setting out radical proposals for an online court. It is clear that a

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<sup>411</sup> The Civil Procedure Rules 1998 No. 3132

<sup>412</sup> see Chapter 2 above

<sup>413</sup> see Chapter 3 above

<sup>414</sup> see Chapters 4 and 5 above

<sup>415</sup> see Chapter 2 above

<sup>416</sup> CPR 26 – case management

<sup>417</sup> Lord Justice Briggs ‘Civil Courts Structure Review: Final Report’ (July 2016)

<sup>418</sup> Briggs M ‘Civil justice: my vision for the Online Court’ (16 May 2016) LS Gaz

rethink of civil proceedings has been prompted by the virtual removal of legal aid so that for most people, including those engaged in small business concerns, access to civil justice is an unattainable luxury:

However, the main theme of my report is the shocking fact that following the virtual withdrawal of legal aid civil justice is quite simply not available to the majority of ordinary individuals (or small businesses) in relation to disputes which, although moderate or small in money terms, are of course extremely important to them. It is because the legal costs which have to be incurred and risked are disproportionate to the value at risk, and because the culture and procedure of our civil courts makes litigating without lawyers very difficult, and potentially unfair when the opponent is legally represented.<sup>419</sup>

The particular problems posed by a rise in the number of litigants in person is addressed in the civil courts structure review final report<sup>420</sup> at Chapter 6, which considered proposals for an online court. The concept of the online court is set out in the final report and is proposed as a new court primarily for those requiring minimal assistance from legal advisers. It would seem the displacement of the principle of orality in this proposal is aimed at moving towards a compulsory system in which the traditional Anglo-American trial system and its associated reliance on the principle of orality would be replaced to a very significant extent in order to afford access to justice in a radically different way. The driver, in this case, is not the plight of vulnerable witnesses, or the particular concerns associated with the use of experts, but the rather pressing realisation that, without funding, the traditional Anglo-American trial system ceases to function. Litigants in person are simply unable to deal with the principle of orality given the process for the receipt of oral testimony. Therefore, the most radical deconstruction of that system is proposed. Case officers would assist litigants, and it would not be anticipated that the traditional process would be used except in the most complex and important cases for those matters valued at £25,000 or less. What is the basis for the legitimacy of modifications to the principle of

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<sup>419</sup> *ibid*

<sup>420</sup> Lord Justice Briggs 'Civil Courts Structure Review: Final Report' (July 2016)

orality in civil proceedings? In respect of those reforms already in place,<sup>421</sup> administrative expediency has driven limited change whereas an acceptance that funding for mainstream litigation involving cases of £25,000 or less appears to be the driver for future wholesale deconstruction. The system continues to develop and may well prove how civil justice is delivered.<sup>422</sup> The risks of excluding those most in need of access to justice, and issues around access and fairness are identified and acknowledged by the Ministry of Justice:

HMCTS have committed to (i) facilitating an overarching evaluation of the impact of reform on 'access to, and the fairness of the justice system, particularly in relation to those who are vulnerable' and (ii) ongoing evaluation and iteration of reformed services in light of insights gathered from data, including using data on the demographic and protected characteristics of users of the justice system to inform service design and identify and tackle disproportionalities.<sup>423</sup>

Dr Natalie Byrom, Director of Research at the Legal Education Foundation, reviews the issue of protecting access in a shift towards the online court for civil matters.<sup>424</sup> It is clear that for such a departure from the traditional trial system minimum standards must be recognised:

an irreducible minimum standard of 'access to justice' under English law, which is capable of acting as an empirical standard for the purposes of iterating reformed services and evaluating the impact of court reform. The components of this irreducible minimum standard are: (i) access to the formal legal system, (ii) access to an effective hearing, (iii) access to a decision in accordance with substantive law, (iv) access to remedy.<sup>425</sup>

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<sup>421</sup> see Chapter 2

<sup>422</sup> Susskind R, *Online Courts and the Future of Justice* OUP 2019

<sup>423</sup> Ministry of Justice (2019). Evaluating our Reforms: Response to PAC recommendation 4, p2, para 6.

<sup>424</sup> Byrom N, 'Digital Justice HMCTS data strategy and delivering access to justice' (October 2019) The Legal Education Foundation

<sup>425</sup> *ibid* p3

### 6.3 A Plethora of Approaches to Expert Evidence

Chapter 3 of this thesis explores issues arising from the use of experts in both civil and criminal proceedings. It can be seen that the place of experts in the litigious environment is driven largely by costs and expediency in civil litigation.<sup>426</sup> However, the criminal forum, by no means immune to the pressure of costs, strives to ensure that expert evidence is scrutinised and tested through live oral testimony to contain the worst outcomes of trials in which experts initially accepted as reliable have in fact been shown to be anything but.<sup>427</sup>

This plethora of approaches to the receipt of crucial, often pivotal, expert opinion is considered in detail in Chapter 3, and in particular the 2016 practice direction<sup>428</sup> illustrates the issues to be addressed to ensure continuing vigilance in testing the reliability of expert based testimony.<sup>429</sup>

The modifications to the principle of orality arguably undermine confidence in the determinative role of the expert's evidence when there is no consistent approach across the breadth of matters to be determined. On the one hand, a single joint expert will be all that is permitted in a civil claim of relatively modest value<sup>430</sup> and on the other concern that reliability based testing of experts in criminal cases with a continued value placed on the principle of orality.

When comparisons are drawn between the different drivers in civil and criminal cases the principle of orality is seemingly superfluous in certain matters such as the small claims track<sup>431</sup> and in others has been seen as of such import<sup>432</sup> it is difficult to reconcile the place of the principle of orality and, in relation to experts, reconcile differences between venues.

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<sup>426</sup> Civil Procedure Rules 35.5

<sup>427</sup> *Dallagher* [2002] EWCA Crim 1903 [2005] 1 CR App R 12, Clark [2003] EWCA Crim 1020, Cannings [2004] EWCA Crim 1

<sup>428</sup> Criminal Procedure Practice Direction 19.6

<sup>429</sup> *R v. Dlugosz* [2013] EWCA Crim 2

<sup>430</sup> Civil Procedure Rules 27

<sup>431</sup> *ibid*

<sup>432</sup> Law Commission, Expert Evidence in Criminal Proceedings in England and Wales, Law Com No 325 (2011)

## 6.4 Evolution or Revolution? More Variations on a Theme

In terms of considering the place of the principle of orality in the pursuit of a fair trial much has been done to seek to justify its modification, almost to the extent of its removal, in certain categories of civil matters<sup>433</sup> whereas on the other hand seeking to justify its necessity in the slow evolution of special measures to support witnesses in criminal matters allowing almost three decades to elapse without a full implementation of the radical reforms proposed.<sup>434</sup> The consequences of those changes does not appear to have undermined perceptions of a justice. In comparison, criminal has somewhat lagged. Chapter 4 explored how, instead, less than satisfactory reforms have been made to try and mitigate some of the worst impacts of oral evidence. But, as that chapter concluded, none as effective as allowing a judge more flexibility in selected the best approach to the presentation of evidence.

Chapter 1 of this thesis sets out the context in which an understanding of the embedded nature of the idea that orality is inextricably linked to the perception of a fair trial. The sense that truth finding depends to an extent on open court challenge is hard to change. The idea of fair play in the determination of truth resting on the idea of confrontation in the Anglo-American trial is considered from U.S perspective by Louise Ellison in a monograph on the adversarial process and the child witness:

Peoples sense of fairness is disturbed by the use of protective procedures such as screens and television links within criminal proceedings. People generally, it is maintained, accord innate value to face to face encounters, as expressed in commonly held notions about fair play and decent treatment of others in social and business relationships.<sup>435</sup>

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<sup>433</sup> Access to Justice Lord Woolf, Master of the Rolls Final Report 1996 at Ch. 10.1

<sup>434</sup> Pigot, Judge T 'Report of the Advisory Group on Video Evidence' (1989) HMSO

<sup>435</sup> Ellison L, *The Adversarial Process and the Vulnerable Witness*, OUP, 2001 at p71

Civil litigation, in its move towards an online court as discussed in paragraph 6.2 above, demonstrates the most radical move away from the idea that a trial is the way to determine truth. Civil litigation has moved away from the focus of truth finding towards a system of dispute resolution. The emphasis has moved to resolution, irrespective of a determination of truth, which minimises the need for adversarialism. Procedures aimed at promoting truth finding are reserved for those cases in which the parties are not able to achieve a settlement. At all key stages of civil litigation, parties are directed to demonstrating why a resolution cannot be achieved rather than focusing on whose version of events should be preferred. Prior to the issue of proceedings, it is necessary to demonstrate all steps have been taken and that litigation is necessary:

**8.** Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings.

**9.** Parties should continue to consider the possibility of reaching a settlement at all times, including after proceedings have been started. Part 36 offers may be made before proceedings are issued.<sup>436</sup>

Once proceedings are issued, the parties must continue to demonstrate that the litigation needs to proceed towards resolution by final hearing rather than settlement without a trial of the facts taking place:

If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.<sup>437</sup>

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<sup>436</sup> Civil Procedure Rules Practice Directions Pre-action conduct and protocols updated February 2017

<sup>437</sup> *ibid*

It would appear that in the civil forum, there has been a real move away from the fact finding trial process as the central focus of proceedings. However, once all attempts to settle have been exhausted Chapter 2 of this thesis demonstrates that a return to the principle of orality, with its modifications largely dependent on the value of the claim, continues to be the basis for the final decision. Despite the radical rethink of the process brought about through the introduction of the Civil Procedure Rules,<sup>438</sup> the process continues to reach a final stage in which the principle of orality remains the basis for decisions.

## **6.5 The Continuing Need for Fundamental Review in the Receipt of Evidence from Vulnerable and Intimidated Witnesses**

Chapters 4 and 5 of this thesis consider the very significant issues relating to vulnerable and intimidated witnesses with particular emphasis on the plight of children in the criminal adversarial trial system. The range of special measures now embedded in the Youth Justice and Criminal Evidence Act 1999 implements reform first recommended almost three decades ago in the seminal report from Judge Pigot.<sup>439</sup>

Those reforms have generated a wealth of empirical studies and critical analysis but rather than showing signs of reaching completion continue to raise difficult issues. Suggestions for the reform of cross-examination, seen as the means by which oral testimony is tested, continue to question the traditional format of adversarialism as the way to determine guilt. Cross-examination is one of the central planks of the principle of orality and radical suggestions for continued reform serve to illustrate the continuing grip of the principle of orality as the bedrock of witness testimony. Laura Hoyano's article *Reforming the adversarial trial for vulnerable witnesses and defendants*<sup>440</sup> considered in Chapter 4 of this thesis in relation to cross-examination moves to a critical analysis of

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<sup>438</sup> Access to Justice Lord Woolf, Master of the Rolls Final Report 1996

<sup>439</sup> Pigot, Judge T 'Report of the Advisory Group on Video Evidence' (1989) HMSO

<sup>440</sup> Crim. L.R.2015,2,107-129

how preserving the adversarial mode of trial and protecting witnesses could be achieved. It is interesting to note that all the suggestions made continue to result in a modification of the principle of orality rather than its replacement to any significant extent. One suggestion is the 'ticketing' of advocates so that only those considered to have an appropriate level of specialist skill should be permitted to participate:

Ticketing of advocates along the lines of the 'sex tickets' for Crown Court and district judges, and the barristers instructed by the CPS, was recognised by the Advocacy Training Council in 2011. It was reiterated by Lord Carlisle's 2014 inquiry into the operation of the Youth Courts, which decried the practice of sending inexperienced advocates there to cut their teeth by dealing with child defendants (and other child witnesses). Sir Bill Jeffrey's 2014 review of independent criminal advocacy also recommended the ticketing of defence advocates in rape and sexual abuse trials, and suggested it be extended to all other cases involving vulnerable witnesses.<sup>441</sup>

## 6.6 Truth Matters

The effect of the principle of orality in modern litigation is plainly different dependent on the nature of the proceedings. In civil litigation, although the embedding of the principle of orality remains for the foreseeable future, reforms have been bolder. The imperative to find different models having regard to the sea change in civil litigation funding has provided the drive towards the most radical proposals seen in the Briggs report.<sup>442</sup> The justification for changes in civil litigation is not that truth does not matter but that fundamentally seeking a resolution to disputes takes priority. Expediency; cost effectiveness and procedural efficiencies have led to the testing of significantly different processes than has been the case in criminal litigation. However, as can be seen with previous areas of

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<sup>441</sup> Hoyano L, 'Reforming the adversarial trial for vulnerable witnesses and defendants' (2015) *Crim. L.R.* 2, 107-129

<sup>442</sup> Lord Justice Briggs 'Civil Courts Structure Review: Final Report' (July 2016)

controversial evidence,<sup>443</sup> civil litigation is a safer testing ground for reform and tried and tested alterations to the receipt of evidence inform subsequent modifications in the criminal forum. For example, earlier tried and tested legislation dealing with the admissibility of hearsay in civil proceedings<sup>444</sup> is echoed in the revised approach set out in criminal proceedings.<sup>445</sup>

The different approach in criminal litigation is attributable to the objectives in criminal trials. Expediency and trial efficiency together with cost savings are a factor in criminal trials, but truth matters and the truth finding process is prioritised. Whatever the reforms necessary to ensure best evidence in the most appropriate setting using special measures to facilitate the needs of vulnerable and intimidated witnesses the necessity to achieve a fair trial in which truth matters cannot be underestimated. Of course, criminal trials do not require a determination of truth in respect of each piece of evidence considered, but in reaching a verdict in which the jury must be sure that the prosecution has discharged the burden of proof and introduced evidence so that guilt is beyond reasonable doubt requires scrutiny of witness evidence. How can that scrutiny be achieved? The basis for the adversarial trial system is considered in Chapter 1 of this thesis. Its historic roots and place in society makes radical reform, such as that emerging in the civil trial system, challenging when this is perceived as risking a fair trial. However, reform proposed at the time of the Pigot report<sup>446</sup> was considered radical and is now accepted as the norm. Recognition that the traditional adversarial trial system with the principle of orality as its bedrock can be reconsidered and more radically re-constructed could give rise to reforms facilitating a more appropriate means for the receipt of testimony without compromising fairness.

It is not the argument of this thesis that, at this point, an adversarial approach must be altogether abandoned. Although that may be a consideration as understanding of the best approach to the legitimate aim of a procedure that secures truth as far as possible evolves. For now, an already radical reform would be removing the use of oral evidence as the

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<sup>443</sup> such as the rule against hearsay considered in Chapters 1 and 2 of this thesis

<sup>444</sup> Civil Evidence Act 1968

<sup>445</sup> Criminal Justice Act 2003

<sup>446</sup> Pigot, Judge T 'Report of the Advisory Group on Video Evidence' (1989) HMSO

foundational aspect of trials. Empowering judges to make choices from a procedural pallet, containing a range of options as a starting point, would be an important step forward in allowing the best suited approach for the particular proceedings selected at the outset. Judges already act as a critical safeguard against some of the worst dangers of oral evidence, removing the outdated barrier of the starting across point being orality would represent an important step-forward.

## 6.7 The Way Forward

**To consider if a review of the place of the principle of orality may result in a more appropriate model for effective receipt of testimony, together with continuing evolution of the trial system in coming years.**

A new approach to procedural frameworks appears justified. Procedures starting with a focus on suitability, rather than modification, may be more effective, giving the ability to plan for purpose rather than simply address problems in the traditional framework. The way forward is to match process with purpose. So by adopting a different starting point, rather than continuing with modifications and hybrids, working systems can be devised with no preconceptions.

As considered in the introduction a key area with sparse consideration in the literature is a systematic approach to the link across civil and criminal matters. Such as in the development of the hearsay rule,<sup>447</sup> in which the reassessment of the principle of orality was tested initially in the Civil Evidence Act 1968 before its principles for a movement away from the need to bring first hand live oral testimony were restructured and set within a modified criminal framework in the Criminal Justice Act 2003.<sup>448</sup> The delay of over 30 years in the recognition of the argument for the receipt of compelling, but otherwise excluded evidence owing to the strictures of the hearsay rule as applied in criminal proceedings, demonstrates that in this pivotal area of evidence the effect of the reliance on modification and a lack of a procedural pallet results in lumbering change. By taking the

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<sup>447</sup> Ibid at p45

<sup>448</sup> s.114

starting point as purpose and building rules to achieve procedural efficacy, decades of slow incremental reform may be avoided. In reviewing a break from tradition, Louise Ellison considers the practice of importing trial process across fora:

Inspiration for procedural reform is frequently drawn from trial arrangements as practised in civil law jurisdictions. However, it is unrealistic to expect that procedural rules can be isolated and imported directly into domestic law<sup>449</sup>

Drawing from civil frameworks enables tried and tested process to inform advances in the methods for fact finding and resultant trial outcomes. However, this strategy remains reliant on modification of entrenched policy. Facilitating ground up process building, informed by existing and new developments elsewhere, but not limited by it, allows for genuinely innovative strides. New frameworks may then focus, for example, on gathering evidence by capturing complete oral testimony in advance of the trial and thereby follow the radical suggestions made over three decades ago<sup>450</sup> which have borne fruit only after a tortuous path to acceptance. Taking the view that these measures could have been implemented as the most appropriate means of receiving testimony from the outset would have enabled suitable testimony to be collated from an early stage. The question is whether it is preferable, and feasible, to construct a more appropriate means for the determination of disputed factual issues.

What may be suitable for civil litigation may not be for criminal litigation. A procedural pallet enabling dispute resolution may look quite different. An honest rethink of why we receive oral testimony in its traditional format for some civil claims and not others, preferring a full three stage questioning process for corporate and government litigants and not for lower value claims more likely to involve private individuals and small businesses.

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<sup>449</sup> Ellison L, *The Adversarial Process and the Vulnerable Witness*, OUP, 2001 at p154

<sup>450</sup> Pigot, Judge T 'Report of the Advisory Group on Video Evidence' (1989) HMSO

As considered in Chapter 2, a fundamental review of the principle of orality and its place in a civil forum may well assist the overall aim of cost saving<sup>451</sup> while providing a more logical format matching the objective of dispute resolution. An acknowledgement of the different aims in various proceedings facilitates best systems; the principle of orality applied for all purposes is not the best fit in all cases.

A common thread linking both civil and criminal matters is the giving of opinion evidence on matters outside the knowledge of the triers of fact. The issues relating to receipt of opinion evidence from those experts whose role it is to provide reliable evidence on matters the court cannot resolve based on witnesses of fact is a strong illustration of the continuing impact of the cross over between civil and criminal matters. This bridge connecting fora is key in the contention that the need for revision and review of the adversarial trial model will be best served by fresh thinking and effective process. The contention is that structural change, rather than piecemeal modification, is the way forward. This bridge is as an underpinning justification in addressing the research question (Chapter 3).

This type of evidence is illustrative of how models can be built to deliver the requisite expertise. It can be seen that the traditional approach results in experts giving testimony individually rather than forming a consensus to enable a way forward based on specialist knowledge in the field. Experts instructed on a partisan basis will have their opinions considered as part of adversarialism, even though modified in accordance with the practice rules.<sup>452</sup> However, receiving expert evidence on a concurrent basis facilitates open debate and experts assist one another in the drawing of proper conclusions and may also challenge one another on the spot. As considered in Chapter 3, fresh starting points may facilitate best process:

Even expert tribunal members will often only have sufficient expertise to better understand the dispute because their expertise will be related to the discipline

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<sup>451</sup> The Review of Civil Litigation in England and Wales R. Jackson 2010

<sup>452</sup> Civil Procedure Rules Practice Direction Pre-action conduct and protocols updated February 2017 and Criminal Practice Directions - October 2015 as amended November 2016, April 2017, October 2017, April 2018, October 2018 & April 2019

generally rather than the particular aspect been placed under the microscope. Expert tribunal members who do fully understand the expert issues will be better able, by training and experience, to put aside any concluded views and take a fresh look<sup>453</sup>

A radical approach to the abandonment of the principle of orality may be achieved by seeking a process for resolution rather than a physical space (the courtroom). This method of progressing litigation could be adopted more broadly in both civil and criminal matters. The possibility of moving away from the principle of orality by modification has been tested, and the resultant reforms support the idea that such novel ideas ought to be considered. The testing of witness evidence via the principle of orality may remain an important tool within a procedural pallet, but systems allowing for different processes could be developed. This approach would remove the necessity of reliance on evolution from a difficult starting point.

The most compelling driver for change arose from the plight of vulnerable and intimidated witnesses. The impact of those changes, and the long incremental road to reform, is considered in Chapters 4 and 5.

When a witness is unable to give the best evidence they are capable of giving, the only interest served is those of guilty defenedants, whether the witnesses be for the prosecution or the defence. The Youth Justice and Criminal Evidence Act 1999 laudably aims to assist vulnerable and intimidated witnesses to give more complete, coherent and accurate testimony in criminal proceedings and to strike a better balance between the various interests of those who enter the criminal process as defendants, complainants and witnesses<sup>454</sup>

It was necessary to draw those issues affecting vulnerable and intimidated witnesses through to demonstrate that without fresh, radical reform, vulnerable witnesses lack the means to be heard. Reliance has been placed on hybrid systems, whereas with an

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<sup>453</sup> Downes G, 'Concurrent expert evidence in the administrative appeals Tribunal: the New South Wales experience' (February 2005) Paper presented at the Australian conference of planning and environmental courts and tribunals Hobart Australia

<sup>454</sup> Ellison L, *The Adversarial Process and the Vulnerable Witness*, OUP, 2001 at p156

acceptance of fresh thinking so much more could have been achieved three decades sooner.<sup>455</sup>

What has emerged inter alia... are the limitations of an accommodation approach to the problems facing vulnerable and intimidated witnesses. The measures which deviate least from the adversarial model and cling to conventional methods of fact finding, albeit in modified form, have been shown to be the least effective both in terms of alleviating the stress associated with giving evidence and for securing access to the best evidence potentially available<sup>456</sup>

The approach suggested by Pigot has been demonstrably right, allowing the development of special measures and the early capture of effective and compelling oral testimony. The diminution in credibility as evidence grows stale should be avoided. The task of the jury is to focus on assessing contemporaneous capture followed by close real time proximity for follow up issues, rather than stretching the elasticity of recollection to the trial itself. As considered in Chapter 5, jurors may find themselves treating credibility as the ultimate issue rather than focussing on the testimony that could have been captured with clarity at, or very close to, the time events occurred. The test ought not to be recollection but contemporaneous accounts and description. For those witnesses with disabilities the late challenges to their evidence at trial gives rise to questions around reasonable doubt. The focus shifts to whether the jury members are able to discern the difference between what arises from fractured memory and an inability to express with clarity in the alien environment of the trial and the truth. Rather than face the courtroom the acceptance as a norm that the whole testimony would be through provision of an account in more familiar settings at the time events occurred has still to be fully implemented. Trial tactics are considered in Chapter 5 and the training for advocates who must modify adversarialism to avoid badgering witnesses acknowledged. However, the long-standing objective of undermining the witness so that intimidatory, if softened, interrogation remains an

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<sup>455</sup> Pigot, Judge T 'Report of the Advisory Group on Video Evidence' (1989) HMSO

<sup>456</sup> Ellison L, *The Adversarial Process and the Vulnerable Witness*, OUP, 2001 at ch V111 Conclusions

undercurrent is hard to eradicate. The idea that the cross-examined witness may produce 'answers that do not represent his knowledge on the subject'<sup>457</sup> prevails.

The recognition that by having the witness present and allowing the jury to observe demeanor in the full glare of the open court room has been acknowledged as flawed.

It appears that although there are physical signs of the truthfulness of a speaker, they are not the signs which are commonly assumed to denote a liar. A sizeable body of research indicates that the physical signs which people often think are indicators that a person is telling lies are really signs of stress; and as a witness may be stressed because he finds it uncomfortable to tell a lie, or because she finds it uncomfortable to tell the truth, the chances of an observer correctly guessing that someone is lying from his or her "demeanour" are little better than the chance of doing so by tossing a coin<sup>458</sup>

In determining the original purpose and remit of the principle of orality it is clear there is a place for court room receipt of testimony but that it is plainly not the most appropriate method in all circumstances. In establishing the potential consequences of the modifications of that principle, in both civil and criminal proceedings, much has been achieved by reform but incremental change, rather than fresh building, hampers the introduction of appropriate systems. By identifying the approach of the English adversarial trial system and change to the approach over time the possibility of moving from the day in court as being the final determination to a system of fact finding through process is seen as possible and effective. The on-line court is moving to fruition as an early indication of how a system, rather than place, for dispute resolution may operate. Decades of change in the way vulnerable and intimidated witnesses are viewed and their testimony handled illustrates the legitimacy and effect of any change in the approach to the principle of orality. This, together with the evolving recognition that opinion evidence from experts may be

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<sup>457</sup> Wigmore, J.H, A Treatise on the Anglo-American System of Evidence in Trials at Common Law 3<sup>rd</sup> edn. (1940), Boston: Little, Brown) vol.5.

<sup>458</sup> Law Commission for England and Wales, Criminal Law: Evidence in Criminal Proceedings Hearsay and related topics, a consultation paper (1991 HMSO) at para 6.24

received using alternative methods, identifies how recognition of new systems adds to the effectiveness of the principle of orality as a means for defining and safeguarding a fair trial.

In proposing continuing review of a model for effective receipt of testimony, together with the ongoing evolution of the trial system in the coming years rather than questioning why the principle must be adhered to from the outset, constructing process entirely more appropriate for the 21<sup>st</sup>-century is the way forward.

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