Chapter 6: Examination-in-chief

Young and vulnerable witnesses

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These hearings will also consider the question whether an intermediary is needed. The role of an intermediary is to provide a report, and if required, to provide assistance to a witness or defendant as directed by the judge: *R v Grant-Murray* [2017] EWCA Crim 1228 at [199]. See also Criminal Practice Directions, para 3F.1: "… they commonly advise on the formulation of questions to avoid misunderstanding. They will on occasion actively assist and intervene during questioning."

Footnote 4

See now, the Crown Court Compendium (July 2019), Part 1, 10–5, para 12.

Footnote 5

See now the Crown Court Compendium (July 2019), Part 1, 10–5, para 15. See also Criminal Practice Directions, para 3F.27 to the effect that where the court has directed that questioning will be conducted through an intermediary, the intermediary should be present at the ground rules hearing to make representations in accordance with CrimPR 3.9(7)(a). And to similar effect, see Criminal Practice Directions, para 3 E.2.

Footnote 7

According to experimental research, the use of props such as diagrams and toys can adversely affect the quality of the evidence of children: see Bruck, Kelly and Poole, 'Children's Reports of body touching in Medical Examinations: The benefits and risks of using body diagrams', (2016) 22 Psychology, Public Policy, and Law 1.

After the section, Leading questions

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Judicial interventions

During the course of the questioning of a witness by an advocate in examination-in-chief, it is not uncommon for judges to intervene and ask questions of the witness. This is perfectly acceptable where the purpose is to clarify the witness's answer. However, judges must avoid giving the appearance of 'entering the arena' or intervening in examination-in chief in such a manner as to affect the witness's ability to give his or her evidence in the best way possible. In *R v Inns* [2019] 1 Cr App R

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61(5), CA at [33] – [38], the Court of Appeal laid down the following principles concerning judicial interventions during examination-in-chief:

1. The tribunal of fact in a criminal trial in the Crown Court is the jury and no one else.
2. The system is adversarial, not inquisitorial, so the role of the judge is that of a neutral umpire to ensure a fair trial between the prosecution and the defence. It is well established that the judge should not enter the arena so as to appear to be taking sides.
3. There is nothing wrong with the judge asking questions in order to assist the jury, which is one of the functions of a judge. For example, the judge may ask questions to clarify a point in a document or in an immediate response to a witness's answer. However, it may be appropriate to wait until the end of examination-in-chief, to see if matters have become clearer: matters which are not clear at the time, may become clearer later.
4. Under an adversarial system, it is for the prosecution to prove its case and it will have the opportunity to cross-examine the accused if the accused gives evidence. This means it will often be unnecessary for the judge to ask questions during the accused's examination-in-chief and is certainly not the role of the judge to cross-examine the accused.
5. It is crucial that the accused has the opportunity to give his or her account to the jury on the way he or she would like to come out elicited through questions from their own advocate. Constant interruptions during examination-in-chief means there is a risk that the accused will not be able to do this.
6. This is the case irrespective of the acused's defence appearing implausible or even fanciful. Where a defence appears to be 'truly incredible', its deficiencies may be expected to be exposed by the prosecution in in cross-examination and unwarranted intervention may be simply counter-productive.

As to para 5, the accused's ability to give her account may be affected not only by interruptions during examination-in-chief, but by the judge's conduct in the absence of the jury where it is hostile or intimidating to the accused, or otherwise leads the accused to believe she will not get a fair trial. See, for example, *R v Myers* [2019] Crim LR 181. See also *R v Tedjame-Mortty* [2011] EWCA Crim 950 and *R v Cordingley* [2007] EWCA Crim 2174.

Jury notes

During the course of a witness's evidence-in-chief, the jury may send notes to the judge requesting clarification of some matter. In *R v Inns* ibid at [40], the Court of Appeal provided guidance on the correct approach to take, which can be summarized as follows: (i) the trial judge is best placed to deal with notes because she will often have to take quick decisions in the context of the questioning and will also understand the entirety of the evidence given thus far; (ii) however, normal practice is to show jury notes to the advocates and reach agreement on how best to address the jury's question; (iii) it may then be appropriate to deal with the matter straight away by allowing the advocate to put the jury's question to the witness, or to deal with it at the end of the witness's evidence; (iv) other ways to deal with the question may include the advocates agreeing a fact or an answer being given by the

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judge; (v) sometimes the contents of the note may need to be discussed in the absence of the jury because it raises a matter of law; and (vi) where the accused is giving evidence, it is undesirable if the frequency of notes sent interrupts the flow of evidence to the extent that the accused is prevented from giving his or her account in a complete or fair way. In respect of (iii), it is submitted that if the decision is made to deal with the question at the end of the witness's evidence, the jury should be told that this will happen but that for now they should focus their minds on the evidence which is about to continue.

Refreshing the memory in court

Present recollection revived and past recollection recorded

Admissibility of statements by witnesses with no recollection

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Footnote 27

See also *DPP v Sugden* [2018] 2 Cr App R 101 (8), (Admin). In DPP v Sugden ibid, it was said at [26]. 'A document does not become evidence in the case merely by being relied on by the witness during evidence in chief, for the purpose of refreshing memory.'

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As to the question whether a witness's evidence that he does not remember the matters in the previous statement can render the previous statement an *inconsistent statement* for the purposes of s 119 of the Criminal Justice Act 2003, see later in this update under **Previous inconsistent statements.**

The conditions

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The principles in *R v Kelsey* were applied in *Cummings v CPS*, [2016] EWHC 3624 (Admin), a case which considered memory refreshing under s 139(1). A police officer, in the course of giving evidence that the accused had refused a breath test, was permitted to refresh his memory from a form recording the refusal, which had been completed by another officer. The officer giving evidence was able to verify the form to the court's satisfaction because he was present when the accused refused the test and the other officer completed the form (at [32]). Whether verification has actually occurred for the purposes of s 139(1) is invariably a question of fact. See also *Sugden v DPP* [2018] 2 Cr App R 101 (8), (Admin) at [31] – [34], citing *CPS v Cummings* [2016] EWHC 3624 (Admin) at [16] – [18].

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Originals and copies

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In *DPP v Sugden* [2018] 2 Cr App R 101 (8), (Admin), it was held that memory refreshing under s 139(1) may be from a secondary document (a copy of an original document or another document derived from the original) provided that the secondary document is likely to be an accurate reflection of the contents of the original and the witness verified it at a time when his recall was better than at the time of giving oral evidence (at [38] sub para 7.8).

Production of the document

Footnote 47

For a critical analysis of police practice in respect of note taking, see three inter-related articles by Wolchover and Heaton-Armstrong, 'Casting the police as criminals?' [2019] NLJ 22 Feb 12, 1 March 11 and 5 April 15.

Refreshing the memory out of court

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See the Crim PD V, para 18C.1: 'Witnesses are entitled to refresh their memory from their statement or visually recorded interview'.

Witnesses should be shown their witness statements so that they can refresh their memories before giving evidence: see the guidance issued by the Crown Prosecution Service, accessible at: https://www.cps.gov.uk/legal-guidance/witness-statements-and-memory-refreshing

Concerning collusion, see the Crown Prosecution Service guidance, 'Witness Statements and Memory Refreshing', which identifies the possibility of collusion and of the witness seeking to 'learn' their statement to ensure their evidence is consistent with a false statement or to otherwise give a false impression of truthfulness. Accessible at: https://www.cps.gov.uk/legal-guidance/witness-statements-and-memory-refreshing.

Refreshing the memory from visually recorded interviews

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Where the evidence in chief of a young or vulnerable witness is contained in a visually recorded interview which will played to the jury prior to the cross-examination of the witness, the Criminal Practice Directions make provision for the witness to refresh his memory as to what he said in the interview, by viewing the recording. The reason for this is that, "The witness's first viewing of the visually recorded interview can be distressing or distracting [and] it should not be seen for the first time immediately before giving evidence." (V, 18C.1). The Criminal Practice Directions, V, 18C.4 and 5 provide as follows:

… 18C. 4 There is no legal requirement that the witness should watch the interview at the same time as the trial bench or jury. Increasingly, this is arranged to occur at a different time, with the advantages that breaks can be taken as needed without disrupting the trial, and cross-examination starts while the witness is fresh. An intermediary may be present to facilitate communication but should not act as the independent person designated to take a note and report to the court if anything is said.

18C.5 Where the viewing takes place at a different time from that of the trial bench or jury, the witness is sworn (or promises) just before cross-examination and, unless the judge otherwise directs: (a) it is good practice for the witness to be asked by the prosecutor, (or the judge/magistrate if they so direct), in appropriate language if, and when, he or she has watched the recording of the interview; (b) if, in watching the recording of the interview or otherwise the witness has indicated that there is something he or she wishes to correct or to add then it is good practice for the prosecutor (or the judge/magistrate if they so direct) to deal with that before cross-examination provided that proper notice has been given to the defence.

Previous consistent or self-serving statements

The general rule

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Where evidence of a previous consistent statement is admitted in evidence, it is not a necessary indicator of truthfulness and, in appropriate cases, a judge may need to direct the jury to this effect. See the Crown Court Compendium (July 2019), Part 1, 20-1, para 10(2) and Example 4.

Statements made on accusation

Mixed statements

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Footnote 119

The question of weight in respect of 'excuses' continues to feature in the Crown Court Compendium (July 2019), Part 1, 16-1, para 3.

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The fact that a witness has made a previous statement but gives evidence that he cannot remember the matters in the statement does not necessarily render the statement a previous *inconsistent* statement (see, in the text, under **Hostile witnesses**). The conclusion that the witness's statement is inconsistent with his evidence obviously cannot be reached where the witness stands by what he said in his earlier statement even though he is unable to remember the matters contained in it. However, it is submitted that such a conclusion could be reached if the witness denies the truth of the previous statement, in which case 'he admits making a previous inconsistent statement' for the purposes of s 119(1)(a), or he is treated as a hostile witness on the basis that he is likely to be able to remember the matters in question and by claiming not to do so he is not willing to tell the truth. See *R v Bennet* [2008] EWCA Crim 248. Compare *Griffiths v CPS* [2018] EWHC 3062 (Admin).

Unfavourable and hostile witnesses

Hostile witnesses

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Even though, during the course of examination in chief, the grounds for treating a witness as hostile are plain, it is inappropriate to begin to cross-examining the witness without making an application. See *R v Hopes* [2011] EWCA Crim 1869 at [19]: it is important that the procedures are undertaken with the proper formality; absent due formality, the separate processes of memory refreshing and cross-examination become blurred with a risk of unfairness to the defence.

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Footnote 173

R v Hopes [2011] EWCA Crim 1869 appears to be an example of exceptional circumstances justifying a *voir dire*. The witness said he was unable to recall events and when the prosecution advocate sought to refresh his memory using his statement, he began to deny having made some parts of the statement. The court held (at [19]) that the jury should have been sent out, and, if necessary, the witness too.

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Concerning the use of section 119 to cross-examine hostile witnesses on their previous statements see *Griffiths v CPS*, [2018] EWHC 3062 (Admin). This was a case of domestic violence, where the complainant began her evidence-in-chief by confirming that the two previous witness statements she had made were true, but went on to say that she did not want to be in court because she and her partner 'had both done wrong that day'. The prosecution put both statements to her, pursuant to s

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119. The first contained details of the alleged assault and the second was a retraction statement in which she said that she did not want to go to court. However, it is not easy to see how the conditions in s 119(1)(a) and (b) were satisfied in these circumstances: there do not appear to be inconsistencies between the complainant's two previous statements and her oral evidence - she said both previous statements were true. See Hungerford-Welch, Commentary, [2019] Crim LR 358. Perhaps the decision might be best justified on this basis- the retraction did not without more contradict the first statement, but the point of the retraction was to prevent the court convicting her partner, which was in effect a denial of truth of the first statement and therefore admissible as an inconsistent statement.

Additional reading

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Andrews and Lamb, 'Cross-examining young alleged complainers in Scottish criminal cases' [2018] Crim LR 34

This article presents the findings of research into the features of questions used by criminal lawyers in Scotland (question type, complexity, repetition and content), the effect of their questioning techniques on children's responses, and the effect of children's ages on responses. The article highlights the need for improved practitioner training on questioning, which should be based on methods scientifically proven to work, should explain the research base for best practice to recipients, and should be continuous and ongoing. Consideration is given to improvements made in England and Wales, including the use of intermediaries (although the point is made that the effectiveness of the special measure of intermediaries has not been objectively or systematically evaluated).

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