

Discuss, with examples, how technology can be used to advance access to justice in the UK.

It was in his musings on the Bach Report that Sir Henry Brooke commented that “technology has the capacity to enhance, empower and automate, but it also has the potential to exclude vulnerable members of society.”¹ In that context Sir Brooke no doubt intended the word “vulnerable” to be given its natural meaning; it is a catch-all phrase, encompassing the entire spectrum of physical, psychological, social, cultural and economic factors that stand to impede access to justice. Sir Henry Brooke’s words, however, may have a particular resonance among criminal practitioners familiar with the narrower definition of “vulnerable” in the Youth Justice and Criminal Evidence Act 1999 (YJCEA). The act defines vulnerability in terms of specific personal characteristics,² applying the concept exclusively to children and witnesses whose quality of evidence is likely to be diminished because of mental disorder, impairment of intelligence or social functioning, or physical disability.³ Over the 20 years since the enactment of the YJCEA, criminal practitioners have grappled with the new technologies it introduced to the courtroom, and their implications for vulnerable witnesses’ access to courts and effective participation in proceedings. This discussion will focus on the examples of “Achieving Better Evidence” (ABE) videos and live-link evidence to see what insights practitioners’ experiences offer into how technology can be used to advance access to justice in the UK, as well as potential pitfalls.

The vast majority (84%)⁴ of vulnerable witnesses are children, for whom testifying in adversarial proceedings can be “harmful, oppressive and often traumatic.”⁵ Historically, children’s evidence was rarely admitted and those deemed competent to testify were required to do so in open court, like adults. In *R. v Wallwork* the Lord Chief Justice said it was “ridiculous to suppose” a jury could attach any value to a five-year-old’s evidence.⁶ This established a presumption against hearing children’s evidence which “remained untrammelled in the practice of the criminal courts”, and was still being followed 30 years later in *R. v Wright*.⁷ The result, according to Lord Williams of Mostyn, was that “far too many

¹ Brooke, H. (2017). *The Bach Report: (3) The use of technology*: <https://sirhenrybrooke.me/2017/09/23/the-bach-report-3-the-use-of-technology/> Henry Brooke Blog [Accessed 05/04/18]

² Cooper, D. Roberts, P. (2005). *Special Measures for Vulnerable and Intimidated Witnesses: An Analysis of Crown Prosecution Service Monitoring Data*. CPS https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Monitoring%2520Data.pdf [Accessed 05/04/18]

³ YJCEA 1999 S.16

⁴ Cooper & Roberts. *Op Cit*. 3

⁵ Home Office. (1989) *Report of the advisory group on video evidence (Thomas Pigot, Chairman)*. Home Office: para. 2.10.

⁶ (1958) 42 Cr. App. R. 153 on p161

⁷ (1990) 90 Cr. App. R. 91 on p94

cases involving the most vulnerable victims [were] abandoned, or not even begun, because the victim [could] not adequately give his side of the story.”⁸ Until recently, these vulnerable members of society were largely denied access the criminal justice system.

The YCJEA is the culmination of a “chaotic patchwork”⁹ of common law and statutory provisions that emerged over the latter part of 20th Century to rectify this. Ss.23-30 formally rolled out a range of “special measures” aimed at enhancing vulnerable witnesses’ participation in criminal courts. Since its enactment, the “primary rule”¹⁰ with children has been that evidence in-chief is given via pre-recorded “ABE” video, and cross-examination is done via live link. By allowing them to participate in proceedings without being exposed to the full rigours of the adversarial British courtroom, technology has been touted as the solution to increasing vulnerable witnesses’ access to justice.

The reception has been largely positive. The Secret Barrister’s recent best-seller described the measures as, for the most part, “sensible, human and proportionate”.¹¹ Data shows that video technology reduces the levels of stress experienced by child witnesses¹² and ensure that cases are considered that would not have been heard previously.¹³ Surveys suggest vulnerable and intimidated witnesses (VIWs) are better assisted (and feel better assisted) as a result of the ‘speaking up for justice’ reforms of which these technologies form an important part.¹⁴

These successes, combined with government pressure to “innovate,” cut costs, and move away from a reliance on physical courtrooms, means video evidence has become a ubiquitous feature of the modern courtroom.¹⁵ With the technology increasingly available to defendants too, some cases are now conducted entirely in this way.¹⁶ Certainly these technologies facilitate prosecutions, but access to justice is not just about getting cases to court or reducing costs. It is about effective participation. To date, there is little conclusive

⁸ Wurtzel, D. (2002) *Special Measures Directions*. 8:5 Archbold News. p5

⁹ Cooper & Roberts. *Op Cit*. p20

¹⁰ YJCEA 1999 S.37

¹¹ The Secret Barrister. (2018) *Stories of the Law and How It’s Broken*. MacMillan. p162

¹² Wilson, J. Davies, G. (1999) *An Evaluation of the Use of Videotaped Evidence for Juvenile Witnesses in Criminal Courts in England and Wales*. 7:1 Eur. J. Crim. Pol. Res. pp81–96

¹³ Cooper & Roberts. *Op Cit*.

¹⁴ Burton, M. Evans, R. Sanders, A. (2006) *An evaluation of the use of special measures for vulnerable and intimidated witnesses*. Home Office: <http://library.college.police.uk/docs/hofindings/r270.pdf> [Accessed 05/04/18] p63

¹⁵ Gibbs, P. (2017) *Defendants on video – conveyor belt justice or a revolution in access?* Transform Justice: <http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf> [Accessed 05/04/18] p1

¹⁶ *Ibid*. p1

research demonstrating that ABE videos and live links do indeed improve the quality of evidence, children's understanding of proceedings or their ability to participate effectively.¹⁷

In fact, value of video evidence (particularly live links) can be diminished by factors similar to those that plague Skype and FaceTime: these include delays, issues with setting up, and sudden cut offs. When combined with the strict time constraints of a court case, this can force proceedings to be rushed.¹⁸ There are also practical problems concerning sound and imaging quality, and the adequate location of in-court screens.¹⁹ Poor quality or visibility means that subtle perceptual nuances are not picked up; changes in facial expression and body language can be missed.²⁰ Where a person is forced to repeat themselves several times, the tone and sincerity of the initial pronouncement is compromised with each iteration.

Reliance on video could also hinder vulnerable witnesses' understanding of proceedings. Video prevents the child having a vision of the whole court, replacing it with a perceptual experience that is partial and saccadic. Furthermore, these technologies may prevent children from gaining a conceptual appreciation of what it means to be involved in criminal proceedings. Davis *et al.* suggest that the "solemnity"²¹ of the courtroom plays a role in ensuring that the witness is fully aware of the implications of their testimony. If the child is not present in court, there is a risk that they will fail to engage in accordance with the gravity of the situation. One magistrate, responding to a Standing Committee on Youth Justice (SCYJ) survey on video evidence, said "I am sure some of them leave having not understood anything of what has just happened to them."²²

Finally, there is the risk that video evidence leaves children feeling disconnected or excluded from proceedings.²³ The SCYJ drew particular attention to the impact that overreliance on technology could have on the relationship between child defendants and their advocates. Even when the child appears in the court in person, building the necessary trusting relationship can be a challenge.²⁴ Respondents to a "Transform Justice" survey described

¹⁷ Gibbs. *Op Cit.* p1

¹⁸ Harris, M. (2018) *They just don't understand what's happened or why: A report on child defendants and video links*. SCYJ: <http://scyj.org.uk/wp-content/uploads/2018/04/SCYJ-Child-defendants-and-video-links.pdf> [Accessed 05/04/18] p10

¹⁹ Gibbs. *Op Cit.* p8

²⁰ Harris. *Op Cit.* p10

²¹ Davis, G. Hoyano, L. Keenan, C. Maitland, L. Mogran, R. (1999) *An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions*. University of Bristol. p29

²² Harris. *Op Cit.* p8

²³ Gibbs. *Op Cit.* p17

²⁴ Wigzell, A. Kirby, A. Jacobson, J. (2015) *The Youth Proceedings Advocacy Review: Final Report*. Bar Standards Board: <https://www.barstandardsboard.org.uk/media/1712097/yparfinalreportfinal.pdf> [Accessed 05/04/18]

particular difficulties in building this rapport in virtual cases.²⁵ Furthermore, children's families engage less with virtual hearings, in which the child appears via live link - often not exercising their right to be present in court or participate in proceedings. With less support from lawyers and families children risk feeling isolated, making them even more vulnerable.²⁶

ABE videos and live links are classic examples of how technology can be used to empower a group previously excluded from the justice system. This being said, practitioners have raised concerns that the same technologies that have revolutionised access for some witnesses risk excluding others. Considering the government's intention to resolve the majority of civil cases through an online court by 2023,²⁷ these insights and concerns may have significance beyond the criminal courts. They should not be overlooked. Virtual evidence has great potential but should be approached with caution and regularly reviewed. In order to have meaningful access to the justice system, some of society's most vulnerable members may need real face-to-face time, not FaceTime.

²⁵ Gibbs. *Op Cit.*

²⁶ Harris. *Op Cit.* p13

²⁷ Rozenberg, J. (2019) *The Online Court: will IT work?* The Legal Education Foundation: <https://long-reads.thelegaleducationfoundation.org/> [Accessed 05/04/18]