

The Impact of the Use of Pre-Recorded Evidence on Juror Decision-Making: An Evidence Review

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This paper summarises and evaluates existing evidence (drawn primarily from the findings of jury simulation studies) on the impact upon juror decision-making of the use of pre-recorded evidence and/or live-link testimony by child and vulnerable adult witnesses in criminal trials across a range of legal jurisdictions.

Key findings

- Though a number of studies have been conducted to explore the influence upon (mock) jurors of the use of pre-recorded and live-link testimony within criminal trials, there is considerable diversity in terms of the scale and methodological rigour of that research. This must be born in mind when interpreting the evidence and its transferability to the real courtroom.
- Nonetheless, the available research does yield some valuable insights, particularly in a context in which direct research with real jurors on the substance of their decision-making is still prohibited in many jurisdictions, including Scotland.
- There is no compelling evidence that the use of pre-recorded evidence or live-links, whether by child or adult witnesses, has a significant effect on verdicts in criminal trials.
- In respect of child witnesses, individual jurors may harbour a preference for evidence delivered live and in person. However, the evidence suggests that this preference does not translate in any consistent or reliable way into collective verdict outcomes.
- In respect of adult witnesses, the evidence base is significantly more limited, but relatively robust studies, in Australia and England, indicate that the use of pre-recorded evidence or live-links by adult female rape complainers does not significantly influence (mock) jurors' evaluations and verdicts.

- The position in respect of adults in other trials is less clear, and requires further investigation, but there is not as yet compelling evidence of a verdict impact when jurors' views are situated within collective deliberations.

Background

There has been growing interest amongst practitioners and policy-makers within the Scottish criminal justice system in making greater and more effective use of digital technology in the courtroom, particularly – but not necessarily exclusively – in the delivery of testimony by child and vulnerable adult witnesses.

Provision already exists in Scotland, under the Criminal Procedure (Scotland) Act 1995, as amended by the Vulnerable Witnesses (Scotland) Act 2004, for live-links to be utilised in order to avoid witnesses having to come into court to give evidence, for prior statements or recorded police interviews to be submitted as evidence-in-chief, and for testimony to be taken and recorded ahead of time by a court-appointed commissioner. To date, however, applications to make use of pre-recorded testimony have been rare (Scottish Court Service, 2015: 13).

Research has demonstrated that both child and vulnerable adult witnesses appreciate the opportunity to give testimony in alternative ways designed to reduce the stress associated with giving evidence in the courtroom in the presence of the accused (Murray, 1995; Hamlyn et al, 2004; Burton et al, 2006). Despite this, concerns have been expressed over the extent to which use of live-links and pre-recorded testimony may influence jurors' evaluation of the evidence and, ultimately, their verdicts – for example, by impacting upon their assessments of credibility.

The aim of this Evidence Review was to evaluate the existing research that tests the legitimacy of these concerns. It considered evidence in relation not only to witnesses' use of pre-recorded testimony at trial, but also their use of live-links.

Methodology

This Evidence Review was conducted between September 2017 and January 2018. An extensive search was undertaken of electronic databases including legal, scientific, and multidisciplinary databases. In addition, searches were undertaken to identify relevant Government reports, as well as reports published by law reform bodies, independent research institutes and third sector organisations.

The Review draws upon experimental studies, mostly from the 1990s onwards, conducted across a range of UK, Commonwealth and European jurisdictions. Priority was given to research studies that relied upon the most rigorous methodologies, arose in legal systems of most relevance to Scotland, and / or had been conducted most recently, on the basis that these hold most evidential weight.

Findings on the Use of Pre-Recorded Evidence by Child Witnesses

Broadly speaking, existing research in this area has demonstrated that – contrary to many people’s misplaced confidence in their ability to do so – jurors are not in fact significantly better able to discern deception when children testify in open court as compared to via live-link or pre-recorded testimony (Clifford et al, 1992; Tobey et al, 1995; Orcutt et al, 2001; Goodman et al, 2006; Landström & Granhag, 2010).

Some – but by no means all – studies have suggested that jurors may harbour a preference for children’s testimony to be delivered live in court, but there is no clear evidence that this impacts in any significant way upon collective verdict outcomes (Swim et al, 1993; Ross et al, 1994; Tobey et al, 1995; Goodman et al, 1998; Orcutt et al, 2001; Goodman et al, 2006).

Findings in respect of children are complicated by factors such as the perceived emotionality of the child (Ask & Landström, 2010; Wessel et al, 2013), his or her age and level of understanding (McAuliff & Korvera, 2012; Nikonova & Ogloff, 2015), and jurors’ preconceptions about the reliability of children’s memory over time (Antrobus et al, 2016).

Findings on the Use of Pre-Recorded Evidence by Adult Witnesses

Far fewer studies have been conducted on the use by adult witnesses of pre-recorded evidence. Research involving rape trial simulations has indicated, however, that the level of any impact upon mock juror decision making is low, and its direction in terms of ultimate jury verdict is unpredictable. Use of special measures by an adult rape complainant may increase one person’s empathy for the witness while raising another’s suspicion about his or her credibility in equal measure (Taylor & Joudo, 2005; Ellison & Munro, 2014).

Beyond sexual offence trials, existing research is extremely limited. Some studies suggest that mode of testimony may have a stronger influence here, which can work against witnesses who do not give testimony live in court (Landström et al, 2005; Fullwood et al, 2008; Landström et al, 2015). It is difficult to place confidence in these findings, however, due to their failure to incorporate a group deliberation stage of the sort shown in previous studies to be of crucial importance.

Using Pre-Recorded Evidence in Practice

There are additional factors associated with the way in which live-link or pre-recorded evidence is operationalised at trial which may also be relevant. The length and format of forensic interviews have been suggested to have a significant effect, but the existing evidence is somewhat inconclusive (Westera et al, 2015 and 2017). What is clearer is that jurors are prone to be distracted by the poor audio and visual quality of live-links and pre-recorded evidence in many courtrooms (Plotnikoff & Woolfson, 2009; Cashmore & Trimboli, 2006; Taylor & Joudo, 2005), and that factors such as the choice of camera perspective may require careful scrutiny for their potential to influence jurors' assessments of witness credibility (Landström & Granhag, 2008). If calls to make greater use of such testimony in trials are to be acted upon in Scotland, they should be introduced within interview contexts and courtrooms in a manner that prevents undue influence upon jurors.

Full references are available in the main report.



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