



# THE VULNERABLE IN COURT: THE USE OF LIVE LINK AND SCREENS

Dr Samantha Fairclough, July 2017

*'There are several barriers to defence advocates invoking the live link and screens for vulnerable defendant witnesses giving evidence. These are based on their knowledge of what special measures are available, perceptions about their usefulness, and concerns about the effects of these measures on the impact of evidence elicited.'*

(Samantha Fairclough, Birmingham Law School)



Victims, witnesses and those accused of crimes are often required to give evidence in criminal trials. Children and/or those suffering from a mental health condition or learning disability/difficulty are considered vulnerable. Others are intimidated by the court process. For such vulnerable or intimidated individuals, it is often much more difficult to give evidence effectively in court, yet their evidence can be vital to the case.

Adaptions – called special measures – can be made to the criminal trial in cases involving vulnerable and/or intimidated people.

These special measures seek to enable these participants to give their best evidence. Fairclough's research (*'It doesn't happen... and I've never thought it was necessary for it to happen': Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials*) focuses on the provision and use of special measures including the live link (giving evidence via video link from a room outside of the courtroom) and screens (giving evidence from behind a screen in court so as not to be seen).

'It is estimated that in England alone over 1 million people have learning disabilities and almost 1-in-6 people has symptoms of a common mental health disorder.'

SAMANTHA FAIRCLOUGH,  
Birmingham Law School

## THE PROJECT

Between November 2014 and April 2015, Fairclough interviewed 18 criminal practitioners to find out their experiences of special measures use in Crown Court trials. The data collected provides an insight into the use of live link and screens by prosecution witnesses, defence witnesses and defendant witnesses. This is the first study to collect such data on defendant witnesses.

'There is evidence of a dearth of awareness about the special measures available to vulnerable defendants, how they may be beneficial, and how to go about securing them in court.'

**SAMANTHA FAIRCLOUGH,**  
Birmingham Law School



'Even if the benefits of the live link and screens were more obvious to criminal practitioners, tactical concerns surrounding securing best (most impactful) evidence and the jury's impression of the defendant would likely continue to deter the defence from securing the measures for vulnerable defendants.'

**SAMANTHA FAIRCLOUGH,**  
Birmingham Law School

## USE OF LIVE LINK AND SCREENS

Fairclough found that all 18 criminal practitioners had multiple experiences of prosecution witnesses using the live link or screens. Their experience of defendant witnesses using them was much more limited. Chart 1 shows that only two respondents had been in a case where a defendant had used live link and only two had been in a case where a defendant had used screens.

Only two other respondents had heard of a defendant giving evidence by live link in a different case. This is in stark contrast to their vast experiences of prosecution witnesses using the same measures.

## WHY THE DEFENCE RARELY INVOKES SPECIAL MEASURES

The low uptake of these measures, in part, relates to the more limited and scattered legal provisions. For the live link, for example, defendants must satisfy additional and more onerous statutory provisions to qualify for its use.

For screens, there is no statutory provision for defendants and it is instead governed by the common law. But this is far from the end of the story.

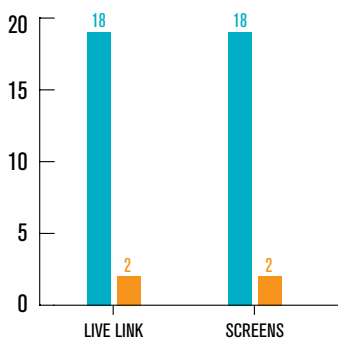
## AWARENESS OF DEFENDANT VULNERABILITY

Fairclough's respondents highlighted that criminal practitioners are not always alert to their clients' vulnerabilities. This finding is consistent with those from previous research studies. Some vulnerable defendants and defence witnesses might conceal their condition or difficulties from lawyers because they are embarrassed. However, some lawyers may hold faulty perceptions of defendants, which mean they do not consider them to need special measures. For example, there was evidence to suggest that some members of the profession presume that the defendant is guilty. This can mean that they do not consider such defendants to deserve the status of vulnerability and the benefits (special measures) attached to it.

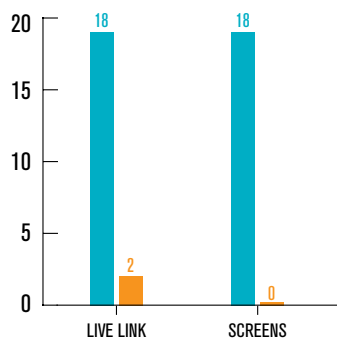
'...there's a problem generally about defence lawyers properly assessing the capability of their clients to engage with the trial process. I think there's a real issue here; particularly with youths, but not just youths.'

**DEFENCE SOLICITOR 2**

**CHART 1**  
DIRECT USE OF SPECIAL MEASURE



**CHART 2**  
EXPERIENCE OF USE BY OTHERS



■ Prosecution Witness ■ Defendant Witness

■ Prosecution Witness ■ Defendant Witness

'I didn't think [special measures] were available [to defendants]?'

DEFENCE SOLICITOR 2

## AWARENESS OF THE LAW

Fairclough found that not all criminal practitioners interviewed were aware of the special measures provisions available to vulnerable defendants giving evidence.

One barrister, with 21 years of post-qualified experience, noted in interview that the live link should be available to defendants (despite the fact that it already is). There is very little written in the legal sphere about the availability of screens or live link for vulnerable defendants. The appellate courts do not encourage their use, therefore further embedding this lack of awareness among the profession.

'[Judges are] of the view 'well you've committed a serious offence; you can't be that vulnerable'. That's the prevailing view.'

RECORDER 2



## 'THE DEFENDANT IS ALREADY IN COURT'

Fairclough found that, on a basic level, many of her respondents viewed special measures as a tool to get a witness to court to secure their evidence. Since defendants are already in court throughout the trial, special measures were perceived by some as redundant in use.

More specifically, the live link was largely perceived as a measure which keeps a witness out of the courtroom. The defendant's presence in court throughout the trial undermines this aim, meaning its use may not be considered helpful by the defence.

The respondents viewed screens as a measure with the primary function of keeping a witness from the view of the defendant.

'Many respondents struggled to see how a vulnerable defendant could benefit from leaving the courtroom to give their evidence by live link or from behind a screen when they have already been sitting in court for the duration of the trial.'

SAMANTHA FAIRCLOUGH,  
Birmingham Law School

Fairclough found that the criminal practitioners interviewed were concerned that allowing a defendant to leave court to give evidence by live link or to be screened when doing so would create a negative perception of the defendant among the jury. They thought it would be viewed with suspicion due to the defendant's presence in court during the rest of the trial.

As a result, screening a vulnerable defendant while they give their evidence was considered nonsensical. A common retort from the respondents to such a suggestion was 'to screen the defendant from whom?' Even screening the defendant from the public gallery was not thought to be necessary since, as before, the defendant has been in full view in court throughout the trial.



## 'BEST EVIDENCE'

Another issue relates to what it means to secure 'best evidence'. To practitioners, it is not so much about its completeness, coherence and accuracy (as it is in the statute) but instead to its impact on the jury. The impact is considered at its strongest if the evidence is given live, in court, in front of the jury. For this reason, a defence advocate would be very unlikely to invoke the live link for a vulnerable defendant.

'I've been pretty firmly of the belief that you best establish someone's credibility by seeing into the whites of their eyes. If someone is giving evidence you want to be able to see their whole-body language, the tone of their voice, the way they look at you.

'Trials are often won or lost on whether they like the defendant and whether they seem truthful or not. I think that comes across much better in open court.'

DEFENCE SOLICITOR 1

## CONSEQUENCES OF LOW UPTAKE OF SPECIAL MEASURES

Failing to adequately support vulnerable defendants by using special measures can have detrimental consequences. If they give evidence it may be of poor quality and they may thus make a bad impression on the jury. If they do not give evidence the jury may use this as evidence of their guilt. To avoid these outcomes, a vulnerable defendant might even forfeit their right to trial and plead guilty.

## RECOMMENDATIONS

Fairclough's review of the use of special measures in criminal trials suggests that the way screens and live links have been framed – essentially as measures for the prosecution – strongly affects their perceived purpose and the profession's awareness and understanding of their potential benefits for vulnerable defendants. This leads her to four recommendations:

- 1 There should be statutory parity for defendants and non-defendants for live link and screens.
- 2 Criminal practitioners at every level should receive training on specifically how the live link and screens could benefit a vulnerable defendant giving evidence.
- 3 Intermediaries should receive training on how these measures could benefit vulnerable defendants giving evidence.
- 4 The judicial direction in relation to screens and live link for vulnerable defendants should be reconsidered to address criminal practitioner's concerns about the suspicion of jury members around their use.

### References

Samantha Fairclough, "It doesn't happen ... and I've never thought it was necessary for it to happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials'

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## THE AUTHOR

Samantha Fairclough is a Lecturer at Birmingham Law School. Her research focuses on the role of equality in the provision of special measures, the way in which special measures decisions are made, and the variety of factors which influence such decisions.

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