

Combating the 'myth of physical restraint' in human trafficking and modern slavery trials heard in the Crown Court

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Combating the ‘myth of physical restraint’ in human trafficking and modern slavery trials heard in the Crown Court

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Abstract

The greatest hurdle to an effective criminal justice response to human trafficking is the prevalence of myths about how exploitation happens and who ‘counts’ as a genuine victim. This includes the myth that, to be a genuine victim, an individual must have been subject to some form of physical restraint. Previous work has demonstrated how this myth undermines trafficking prosecutions in various jurisdictions. It has demonstrated that, in the absence of physical restraint during their exploitation, victims are deemed to lack credibility. However, what is missing in the current body literature is a robust analysis of whether something should be done to address this issue. By engaging with the foundational principle of accurate fact-finding, this article argues that some form of regulation of cross-examination in the English and Welsh jurisdiction, with a view to preventing this myth from manifesting in trials, would be justified.

Keywords

best evidence, factual accuracy, human trafficking, modern slavery, myths

Introduction

International law defines human trafficking as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the

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purpose of exploitation.¹ It is often misunderstood; there are many prevailing myths about how exploitation happens and who 'counts' as a genuine victim. As is well documented, such myths, in turn, frustrate the criminal justice response to trafficking and modern slavery because they have the effect of hampering detection, investigation and prosecution (Gallagher and Holmes, 2008: 332; Jones, 2010: 1185; Richmond, 2015: 29; Shoaps, 2013: 938; Uy 2011: 210).

Broadly speaking, it is this propensity for myths to hamper the criminal justice response to trafficking that is the focus of this article and empirical study. The specific myth in question, is the notion that to be a victim of trafficking, an individual must have had significant restraints on their free movement (Dando et al., 2016) if not by 'chains', it is expected that they should, at the very least, be locked away during their exploitation (Richmond, 2015: 29). This does not reflect the reality of how trafficking victims are exploited. Though there are many varying modes of trafficking, total control over a victim's movement remains very rare (Richmond, 2015: 24). Victims of trafficking will usually have some degree of free movement during their exploitation. This myth is grounded in an expectation that a victim of trafficking would seek to leave or escape when presented with the opportunity to do so (Richmond, 2015: 24). As is reflected in the definition above, coercion is often more subtle (Richmond, 2015: 25). The reality of this crime is that it is incredibly difficult for victims to leave or escape despite the lack of physical constraints. This will be discussed in detail below.

As with other 'myths', this notion that a victim must have been subject to some form of restraint has an adverse effect on the criminal justice system's ability to deal with trafficking. In Farrell, Owens and McDevitt's study (2014: 150) of trafficking investigations in 12 US counties, for example, it was found that the police tend to have difficulty in convincing prosecutors to move forward with human trafficking cases where there was no evidence of force or restraint on the part of the alleged exploiter (Farrell et al., 2014: 50). Prosecutors were inclined to believe such cases would not result in convictions. This results in a failure to deliver justice for many victims and a failure to deter individuals from committing trafficking offences. As Kara (2010: 40) has shown, the lack of a prospect of a trafficker being convicted creates a situation where the risks associated with committing a trafficking offence are low whilst the rewards are high. Furthermore, the failure of the criminal justice system to adequately deal with certain cases of trafficking may, ultimately, serve as a 'how to' guide for savvy organised criminals.

This myth also has a damaging impact on the perceived credibility of a victim during the trial itself. The United Nations Office on Drugs and Crime has conducted a large study (2017) of evidential issues that arise in trafficking cases across multiple jurisdictions. One of the challenges they identified was proving a victim had been exploited when the evidence shows that the victim's movements were not totally controlled by the alleged exploiter and were free to come and go as she or he liked (UNODC, 2017: 132). Establishing a lack of freedom of movement seems to be an important element in building a trafficking in persons case and this can be undermined when the victim, as is often the case, had a degree of freedom to come and go during their exploitation (UNODC, 2017).

The UNODC also reports that there 'is often an expectation, either implicitly or explicitly, that legitimate victims of crime would naturally seek out help or escape at the first opportunity. When victims fail to act in this way, sometimes courts impugn their credibility' (UNODC, 2017: 112). Where victims have some freedom of movement or elect not to escape, defence lawyers, in various jurisdictions, have been inclined to argue this demonstrates that the victim has not been exploited and, instead, were consenting parties to the situation they find themselves in UNODC (2014: 36). Prosecutors interviewed for a study of trafficking trials in the USA also allude to the difficulty in explaining to a jury that a victim could be being held even though they spent their time in a room with no lock on the door (Nichols and Heil, 2014: 10).

1. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (adopted 12 Dec 2000, entered into force 25 December 2003) 2237 UNTS, art. 3(a).

There is limited literature on whether the myth of physical restraint manifests in criminal trials in the English and Welsh jurisdiction. Fouladvand and Ward (2018: 144) speculate that the complainant's free movement may be used to attack their credibility during the trial, and a report conducted in 2013 for the Centre for Social Justice cites a solitary example of a complainant being questioned on why they did not just 'walk away' (2013: 32).² However, a comprehensive study of whether the myth manifests in English and Welsh trafficking trials is missing from the current body of literature. This article addresses this gap. By drawing on in-depth interviews with barristers conducted throughout 2020, this article provides evidence that the topic of the complainant's degree of freedom is frequently raised with a view to demonstrating that they have not been exploited.

This article also determines whether it is acceptable that the myth of 'force and restraint' can manifest during criminal trial. Whether and how the law of evidence should seek to address the attacks on the credibility of alleged trafficking victims during cross-examination is a subject largely missing in the current body of literature. As such, the second purpose of this article is to consider whether the law should regulate cross-examination in English and Welsh trafficking trials on the basis that it effectively tends to weaponise the myth of physical restraint (by, for example, asking trafficking complainants: 'Why didn't you just leave?'). 'Regulation', in the context of cross-examination, refers to any legal reform that alters the way in which a complainant is questioned or gives evidence (Ellison, 2001: 373). This may include changes to the environment in which the complainant is questioned (such as the provision of special measures under the Youth Justice and Criminal Evidence Act) or restrictions being placed on the questions that can be asked by the barrister. The regulation of the cross-examination of complainants of sexual offences³ is an example of this. For many years, this has been one of the most controversial aspects of the criminal proceedings in England and Wales, with defence barristers asking humiliating and intrusive questions about the complainant's sexual history with a view to undermining their credibility (Temkin, 2000a: 8).

The Home Office published *Speaking up for Justice* in June 1998. This report found that the practice of regulating the use of sexual history evidence in the courts was unsatisfactory; the law was very inclusionary, with much sexual history evidence featuring in criminal trials (Home Office, 1998: para. 9.70). It concluded that sexual history evidence was being used to 'discredit the victim's character' (Home Office, 1998) in ways which were immaterial to the issue of consent. This led to the introductions of s. 41 of the Youth Justice and Criminal Evidence Act (YJCEA) 1999, which prevents a barrister from questioning complainant on their sexual history unless it fits within one of the 'four gateways of admissibility'.⁴

As such, the introduction of s. 41 partly reflected the general principle that poor-quality evidence should not be put to jurors. It may, therefore, be considered a manifestation of what Roberts and Zuckerman have called the principle of 'accurate factfinding' (Roberts and Zuckerman, 2010: 18). This is one of five 'moral touchstones' (Roberts and Zuckerman, 2010: 18) that guide the construction of the laws of criminal evidence, including the rules governing how cross-examination is conducted.

In order to do justice in individual cases and to protect the community from crime the right offenders—and only them—have to be caught, tried and punished, and the principle of accurate fact-finding is the ultimate golden thread tying criminal proceedings to public interest.

This article demonstrates that cross-examination, focusing on the complainant's degree of freedom, is likely to result in poor-quality/misleading evidence being put to jurors, which may, in turn, contravene

2. Muraszkiwicz also predicts that similar questioning would be directed towards defendants seeking to rely on the defence outlined in s.45 of the Modern Slavery Act 2015. See: Julia Muraszkiwicz 'Protecting victims of human trafficking from liability: an evaluation of section 45 of the Modern Slavery Act' (2019) 83(5) JCL 394, 404.

3. Youth Justice and Criminal Evidence Act 1999, s. 41.

4. Ibid., s. 41(3)(a)–(c).

this guiding principle of ‘accurate factfinding’ (Roberts and Zuckerman, 2010: 18). However, in reaching this conclusion, some exploration of what the principle of accurate fact-finding really means was necessary. As such, this article argues that this cross-examination amounts to a breach of this guiding principle of the basis that it paints in ‘incomplete’ picture for the jury.

Furthermore, it is argued that such cross-examination contravenes the spirit of the Palermo Protocol (which the UK has signed) and could have the effect of putting the victim on trial. On this basis, in addition to the breach of the principle of accurate fact-finding, this article argues that some form of regulation should be introduced to address any potential adverse consequences of this cross-examination. The final part of this article explores the various approaches that could be taken to achieve this. It also demonstrates how this ‘regulation’ would fit within the broader need for a ‘specialist’ criminal justice response to counter ‘trafficking myths’.

Methods

To determine whether, and how often, the myth manifests in the cross-examination of trafficking complainants in England and Wales, it was necessary to obtain an insight into how cross-examination is conducted by engaging with the experiences of those in a position to provide the relevant data. This is because such information cannot be found in the current body of literature.

Throughout 2020, I conducted 16 interviews with practising and former barristers about their experiences in human trafficking trials heard in the Crown Court. Principally, it was hoped that these interviews would reveal if, and how, the myth manifests in criminal trials. I also interviewed solicitors, representatives from victim support organisations and individuals who have given expert testimony in trafficking cases to get a wider sense of what goes on during trafficking trials. It was not anticipated that my sample would be large enough to produce generalisable findings. However, research centred around the insights of a select group of lawyers has been said to be ‘sufficient to reveal a number of important issues’ (Temkin, 2000b: 221) despite this lack of generalisability. For example, Temkin’s study of barrister’s perceptions of rape cases was based on interviews with 10 barristers (Temkin, 2000b: 221). This project seeks to fit within this category of important, albeit non-generalisable, research. As with Garland and McEwan’s research on the operation of criminal trials, the interviews that have been conducted for this research provide a mere ‘snapshot of...practitioners’ experiences’ (Garland and McEwan, 2012: 239). From these interviews, as is presented below, it was established that the myth manifests in various ways.

As mentioned in the introduction, making a determination as to whether there ought to be some form of regulation entailed engagement with the principle of accurate fact-finding. As this principle is referred to in various legal, policy and academic documents, in engaging with these materials to define what this principle means, so that it can serve as a workable framework for analysing the cross-examination in question, this project has also engaged in documentary research. This is to say that it has looked to these documents to ‘understand their substantive content or to illuminate deeper meanings’ (Ritchie, 2012: 35). After establishing what the principle of accurate fact-finding entails, this article seeks to establish whether the use of myth of physical restraint, in criminal proceedings, amounts to a breach of this principle. To apply this principle to cross-examination in trafficking cases, it is also necessary to deconstruct the myth of physical restraint so that it can be explained as to why the cross-examination in question breaches the guiding principle.

The ‘myth of physical restraint’

Before assessing whether the myth manifests in English and Welsh trials, it is important to explain why trafficking victims may be exploited despite having a degree of freedom. By engaging with the relevant literature, this section seeks to deconstruct the myth of physical restraint. This material can, therefore,

begin to demonstrate why attacks on a complainant's credibility, on the grounds that they had some free movement during their alleged exploitation, are misleading.

Certainly, it should not be assumed that because an individual, seemingly, had an opportunity to leave or escape (in the absence of chains/locked doors) they have not been exploited. For a variety of reasons, the reality of trafficking is that it is incredibly difficult for victims to leave. For example, one of the first things that most traffickers do is to take away their victim's passports (Srikantiah, 2007: 185). They tend to limit or block all communication with friends and family and withhold any earnings, resulting in a dependency, on the part of victims, on their abusers, with their chances of escape significantly diminished from the outset (Srikantiah, 2007: 185). Korzinski, for example, finds that traffickers 'force the victim into a position of isolated helplessness...completely reliant on the trafficker for her survival' (Korzinski 2013: 48–49).

Furthermore, as the NGO 'Stop the Traffik' (2019) have written: 'many victims are trafficked away from their countries of origin, and into countries and cultures that are unfamiliar to them, and traffickers also capitalise on their victims' unfamiliarity with the new country by instilling the fear of the unknown into their victims. They convince those they have trafficked that the country they in is incredibly dangerous and they will not survive for long on their own. Victims fear they will be arrested for being in the country illegally and deported or imprisoned.'

Of course, human trafficking and modern slavery are broad terms that encompass a wide range of exploitative acts and, therefore, there is not one single way in which victims are coerced and controlled. Overall, the continued compliance of victims, as will be shown below, in the absence of total confinement, tends to be secured through 'a mixture of violence, threats, psychological coercion, and emotional manipulation' (Cockbain and Brayley-Morris, 2017: 136). For this reason, there should be no expectation that the individuals in the extracts above should have been expected to have left,

Physical assaults, for example, may be carried out at random or as 'punishment' for perceived misdemeanours (Cockbain and Brayley-Morris, 2017: 136). This has the effect of brutalising victims, and it serves as a warning for others of what could happen should they disobey their exploiters (Cockbain and Brayley-Morris, 2017). In addition to actual violence, threats of violence are commonplace and an effective way of securing compliance and deterring escape. Victims have reported knowing, or knowing of, individuals who had escaped only to be located and brutalised as punishment (Giobbe, 1993: 33). Some victims have stated that traffickers had taken their photographs, possibly to help locate them if they ever escaped (Hopper and Hildago, 2006: 199).

Such threats are likely to leave many of the victims terrified of recriminations. A former police officer, and now regular expert witness, interviewed for this project discussed the challenges associated with 'running away' from organised criminal gangs in some cases:

P8: Well first off, they owe \$20,000, recruitment is often local, recruitment often involves family members, so in the case of Romanian children who are trafficked all over the world for begging and stealing- that's actually negotiated by the parents with the gangs. So that child misbehaves, runs away the gang will take it out on the family,... When you go to court in sexual exploitation cases 'well the door opened 20 times a day when clients came in why didn't you run away' well you know the traffickers are the Albanian Mafia or the Lithuanian Mafia you know you not going to run away, cause they'll find you.

In their work on victims of forced labour, Bales et al. describe methods of psychological manipulation used by traffickers: 'victims of forced labor often suffer psychological assaults designed to keep them submissive. Cut off from contact with the outside world, they can lose their sense of personal efficacy and control' (2004: 36). During the process of trafficking, the identity of victims and their sense of self are often impacted (Hopper and Hildago, 2006: 199). In some situations, traffickers have changed victims' names, altering their identity on the most basic level (Hopper and Hildago, 2006: 199).

Victims are treated as commodities and may come to view themselves as dispensable property and verbal abuse contributes to depressive symptoms, particularly a negative self-concept, as they may be constantly told that they are stupid or worthless (Hopper and Hildago, 2006: 199). As Frundt (2005), a victim of domestic sex trafficking, has suggested, the constant verbal abuse and humiliation erode a victim's already low self-esteem and result in dejection, passivity and compliance.

In addition, traffickers will often secure compliance by providing small gifts/rewards (such as food and female sanitary products) which, to an isolated victim, may appear to be genuinely kind acts (Baldwin et al., 2015: 1176). As Herman has written, 'the capricious granting of small indulgences may undermine the psychological resistance of the victim far more effectively than unremitting deprivation and fear' Herman (1992, 78). As such, victims are manipulated into thinking they are in a good place and are being well looked after.

Furthermore, many trafficking victims have described the security and structure provided by the trafficking situation as a key reason for remaining with their exploiters (Cockbain and Brayley-Morris, 2017: 138). The prospect of returning to their former lives is often seen as daunting, especially for those who had been with their exploiters for many years (Cockbain and Brayley-Morris, 2017: 138). Moreover, in some cases, victims have said they felt 'part of the family' and a strong sense of attachment with their abusers (Cockbain and Brayley-Morris, 2017: 138).

Overall, therefore, the argument that an individual cannot have been exploited because they had the opportunity to leave conveys a fundamental lack of understanding of how trafficking victims are controlled and coerced. Yet, as the interview data suggests, this argument has been made in criminal cases and the cross-examination of alleged trafficking victims often lays the groundwork for it.

Interview data and analysis

My sample had significant experience of trafficking trials. By engaging with their experiences, my 'snapshot of practitioner experiences' suggests that the topic of an alleged victim's lack of restraint, and their general degree of freedom, frequently arose during criminal proceedings. Indeed, of the 16 barristers interviewed, 13 recognised the use of this tactic.

The interview data suggested that defendants seeking to rely on defence outlined in s. 45 of the MSA⁵ are also challenged on how much free movement they had during their alleged exploitation. For example, an expert witness who is regularly tasked with assessing whether an individual charged with an offence is a victim of trafficking remarked:

P8: Every time I go to court I hear 'well the door wasn't locked' 'why didn't you just run away'.

This article, however, will limit its analysis to instances where the complainant is challenged on their degree of freedom/lack of restraint. The matter of whether the questioning of the prosecution ought to be regulated is best treated separately from the question of whether the defence's cross-examination should be regulated. There may, for example, be an argument that the defence should have greater leeway to impugn the credibility of a witness on the grounds of 'equality' (bearing in mind that there is always likely to be an imbalance of power, money and resources between the prosecution and the defence). For this reason, cross-examination on a defendant's degree of freedom, conducted by the prosecution, should be treated as a separate context to that of a complainant.

The interview data clearly demonstrates that the myth manifests in the cross-examination of complainants. Some participants spoke in general terms:

5. Modern Slavery Act 2015, s. 45.

P7: They're challenged about all of these factors. For example, the level of freedom they had, their living conditions, how they came to the UK, how much money it cost them to get real or dodgy immigration papers, that tends to be the whole focus of the cross examination

Generally, this applied to cases involving alleged forced labour (this was the form of trafficking with which my sample had the most experience). There was one striking instance in which the complainant's free movement was raised in a case of alleged sexual exploitation; the defendant had been charged with a sexual offence (though the facts of the case seemed to fit within the definition of trafficking), and the complainant's degree of movement was utilised to suggest they had given some form of consent:

P3: The thrust of the case, if you'll forgive the expression, was that he was sharing her with his mates. He and she had got into the habit of getting in his car and going to various car parks and doing what you do in car parks when you're nineteen, when she was sixteen. And he'd essentially groomed her to such a point that she didn't object much when he turned up with two of his friends...they started wanting sex from her.

The participant identified this case as one of the few trafficking cases they had been involved with. They also suggested that this case would have been 'simpler' had the defendant been charged with a trafficking offence, but this was not explored in the interview. However, we did discuss how the defence approached the case and the cross-examination of the complainant:

P3: It was a consent defence in broad terms. Their case was that she didn't leave the car at any point because she was a willing participant throughout. They also argued she was goading them onto threesomes and four-somes. There was exploration of 'well if you didn't like it what did you do about leaving... You had a phone... why didn't you text for help'.

Thus, the fact that the complainant neither physically left nor phoned for help in this situation was used to suggest that she had consented to the arrangement. These facts were used to suggest that complainant had consented to the arrangement.

Article 3(b) of the Palermo Protocol states that if a victim's consent to the intended exploitation is obtained through any improper means (threat, force, deception, coercion, giving or receiving of payments or benefits, abuse of power, or position of vulnerability) then the consent is negated and cannot be used to absolve a person from criminal responsibility. This is also reflected in the offences defined in the MSA. An individual charged with 'Slavery, servitude and forced or compulsory labour' may be guilty even if the complainant had consented to their treatment. Similarly, a defendant charged with 'human trafficking' even where the complainant had consented to travel. As such, it was not expected that the interview data would reveal situations in which barristers cross-examined complainants on how much free movement they had with a view to outrightly suggesting they had consented. However, as this extract demonstrates, there remains a prospect of this exact line of questioning being put to trafficked persons in situations where the defendant is charged with an alternative offence.

The use of alternative offences, including sexual offences, drug offences and offences against the person, the common law offence of kidnapping, false imprisonment and child abduction, is not unheard of (Southwell and Jones, 2018: 88–104). As Gallagher and Karlebach point out, the 'complexity of the trafficking offence can often be a barrier to effective prosecution' and the 'availability of alternative offences that recognize the gravity of the harm inflicted on victims is important from...an operational... perspective' (2011: 6). This, of course, does not mean that the complainant falls outside of the definition of a victim of trafficking. Whilst, in this instance, the complainant's supposed consent may be a relevant factor in determining whether the defendant is guilty of an alternative crime, it should not be suggested that the lack of an attempt to escape is itself evidence of consent. As the previous section outlines, there is a multitude of ways in a victim of sexual exploitation might be coerced and controlled. Indeed, the participant is clear that she was 'groomed'. As is often the case with trafficking, this is likely to have entailed

significant attachment and dependency on the part of the victim. As such, it is still very possible that she had been exploited despite not seeking to run away. The suggestion that she could have left is misleading because it conveys a lack of understanding about how the victim in question might have been coerced and controlled.

The following two extracts are two of the clearest examples of the use of this tactic being used in the cross-examination of complainants of offences under the MSA:

P1: There were allegations of people being used as slave labour. Young Eastern European men coming to work in food processing factories

Researcher: And you were defending?

P1: I was defending someone who was said to be the gang master and was unusual in the sense that he was housing them as well, usually they provide accommodation, if you can call it that, but he was living in the same accommodation

Researcher: And in this case, what was your argument?

P1: I was trying to show by the fact he and his family were living there it wasn't as bad as people were saying it was. Take housing. It's a good example. Often people who are housed in that situation are housed in squalor with little access to heating sanitation and water even. He was living in the same type of accommodation as them. So that's quite an interesting point because landlords don't usually live in the filth they create.

Researcher: Ok, and to that end did you cross-examine any complainants in that case

P1: Yes

Researcher: And the questions I assume you asked whether was client present in the house?

P1: Yeah I'd laid the ground work by establishing that he and his family were there before the various other people moved in, that they shared the same facilities, people had access to everything, for example, the internet, there was no restrictions on using the bathrooms or going to the loo, that kind of thing.

Researcher: Right, so you asked them whether they were free to use the loo?

P1: Yes.

Researcher: Were they free to leave the house as far as you understood it?

P1: There was an argument about that.

Researcher: Right, so you asked...

P1: You ask whether they had keys. Whether or not people let them out and whether transport was provided as is often the case.

The most notable aspect of this extract is that the complainant's degree of freedom was used to suggest that the overall conditions in which they were kept were not necessarily exploitative. The lack of confinement to the house, in conjunction with the fact the defendant was living with them and that they were free to use the toilet, was presented as evidence that the living conditions were not exploitative. A similar suggestion was made in another case:

P10: The allegation was that they had found street people in Latvia and then paid for them to be brought to the UK normally flown in but sometimes driven to the UK And then they've been put to work in factories...and all of their income had been bypassed to the defendants and spent on their cards.

Researcher: So what kind of freedom did they have? Do you remember?

P10: They had a bedroom, but it was shared occupancy. They had some money, but very little. They were fed the same food as the defendants, but they'd had their passports taken from them. And then they were sort of allowed to go out and roam the streets and you know, have that level of freedom.

Researcher: Did you ask them if they considered themselves victims?

P10: Yeah, the line of cross examination for all of them was whether they thought that their life was better here than there and whether the thing that really upset them was the fact that they'd had money stolen from them. And that was probably 90% of them said that that was the real issue, the fact that they've been promised money that they had never had. At that stage of the case, I was running the argument that they'd been defrauded but not exploited.

Researcher: I see. And is there a distinction? What's the distinction between those two things do you think?

P10: We were saying that the argument for the defence was that the conditions they were living under weren't the conditions of a slave or somebody being exploited, given where they've come from or the conditions they'd come from. Not a massively attractive defence, but that was the only thing we had.

As with the preceding instance, the freedom to leave the confines of their housing was one of several factors used to argue that the complainants had not been kept in exploitative conditions. In this case, the barrister also sought to argue that the conditions in which the complainant was kept represented an 'improvement' on their lives in Latvia undermined the claim that they had been exploited. However, the participant does acknowledge that this line of defence is not 'attractive'. Presumably, this is because it implies that there are certain living conditions that would be exploitative for a British person to reside, but not for a Latvian individual.

Before considering whether the cross-examination in these extracts is misleading, it is useful to recognise how it fits within the relevant legal framework. Under the Modern Slavery Act 2015 (MSA), an individual commits human trafficking if they arrange or facilitate the travel of another person with a view to them being exploited.⁶ It is irrelevant whether they consent to the travel.⁷ An individual is exploited if they have been subject to slavery, servitude and forced or compulsory labour, sexual exploitation, organ removal. There is also a broad provision which states they may also be exploited if they are subject to force, threats or deception designed to induce them to provide services.⁸ Of all these examples, 'slavery, servitude and forced or compulsory labour' is the most appropriate for examining the cases outlined above. Under s. 1, it is also an offence for an individual to subject someone to slavery, servitude and forced or compulsory labour regardless of their involvement in the 'travel' arrangements. The key question is: can someone be a victim of 'slavery, servitude and forced or compulsory labour' whilst having the degree of freedom outlined in the cases above? If their degree of freedom can be construed an expression of consent, then the MSA is clear that the fact a complainant had such freedom does not preclude them from being classed as subject to 'slavery, servitude or forced or compulsory labour'.⁹ However, it also states that in 'determining whether a person is being held in slavery or servitude or required to perform forced or compulsory labour, regard may be had to all the circumstances'.¹⁰ Presumably, this means that the complainant's degree of freedom may, under the MSA, be a relevant factor in determining whether they have been exploited.

This appears to be the suggestion made in the cases outlined in the extracts. The question is whether it is legitimate to suggest that a complainant cannot have been exploited where there is no physical restraint.

6. Ibid., s. 2.

7. Ibid., s. 2(2)

8. Ibid., s. 3.

9. Ibid., s. 1(5).

10. Ibid., s. 1(3).

It might be argued, for example, that, in such a situation, the fact that the complainant remained is indicative of some form of voluntariness on the part of the complainant. Where there is this voluntariness it might be suggested that there has been no exploitation. This claim, however, leads into a broader debate about whether voluntariness negates exploitation.

Certainly, there are individuals who want to work in exploitative work conditions. (Chuang, 2017: 119; Jones, 2012: 502). From the data available, it is inferred that the complainants in the extracts seem to fit in this category. For example, the Latvian factory workers, in the final extract, certainly seemed to have a difficult life in Latvia and this was the reason they agreed to come to the UK. Under what has been coined the 'liberal' approach, however, an individual cannot be exploited if they have consented to the treatment in question. 'Liberal' here refers to a respect for individual liberty and autonomy (Jones, 2012: 500). Jones maintains that the liberal approach 'prioritizes consent by applying blame and moral culpability for the offense only under circumstances in which consent is negated by fraud, force, or coercion' (Jones, 2012: 500). As such, where an individual makes what is regarded as a 'bad choice', they are to be deemed to be responsible for the consequences of their actions (Jones, 2012: 500), even if, for example, those consequences include being housed in squalor and undertaking unpaid/extremely low paid work.

In contrast, Herzog posits that for consent to be effective, there must be some reasonable alternative to withholding it (Herzog, 1989: 225). He maintains that if giving consent is the only means to, for example, survive or avoid starvation, the purported consent is ineffective because there is no reasonable alternative to withholding it: 'If a merchant [is] at sea, and a vicious storm blows up; [and] the only way [the merchant] can survive is to throw...goods overboard' and he does so, the merchant does not act voluntarily' (Herzog, 1989: 225).

Herzog claims that the harmful nature of the storm and the merchant's need to survive vitiate the voluntary nature of the merchant's actions, because there is no reasonable alternative to the merchant's throwing the goods overboard (Herzog, 1989: 227). However, this raises a further question of how dire the 'alternative' to giving consent must be for it to be said that withholding consent is unreasonable? Could other severe consequences also amount to an 'unreasonable alternative', or must it be a literal matter of life and death?

Under Herzog's conception, for example, the apparent voluntariness of the trafficking complainants, in the interview extracts above, would have to be contextualised within the factors that gave rise to it; why would they willingly agree to work and live in such poor conditions? Again, it is difficult to generalise and, in fairness, it is not known why the complainants in these cases chose to work in these exploitative conditions. However, it is often the case that individuals will be willing to live and work in poor conditions out of genuine desperation. Many see it as an opportunity to accrue an income, send money to their families and/or alleviate their poverty (Davidson, 2013: 176). The Latvian factory workers seem to fit within this category. Strictly speaking, they are not making such a choice to 'survive', but there are still very compelling pressures on them. Furthermore, can it really be definitively said that an individual will always view their 'survival' as a more compelling reason to give consent to something than, for example, protecting the wellbeing of their family? Perhaps some individuals would view it this way; however, it is strongly argued that this would not universally be the case. Once it is accepted that an individual may 'reasonably' give consent to be in an exploitative situation, in circumstances where withholding it would be unpalatable, it should not be dictated as to what counts as a palatable and unpalatable option. The no 'reasonable alternative test' must take account of the perspective of the individual who has given the consent, and what they regard as a reasonable and unreasonable alternative to withholding it. This is preferable to an approach which prejudices what circumstances may effectively negate consent because it recognises the wide array of reasons that might compel an individual to make a particular choice. Many trafficking victims, for example, who do give some form of consent to live and work in exploitative conditions, do so because their circumstances compel them to do so (Jones, 2012: 502).

Thus, under this developed conception of the relevance of consent, an individual can be kept in conditions which are exploitative, even though they have consented to that treatment and had the opportunity to leave. Seemingly, this is applicable to the individuals in the interview extracts. Their consent should not be construed as a negation of their exploitation. Questioning the complainant on the degree of freedom they had, with a view to undermining the claim that they have been exploited, is, therefore, a misleading argument.

Additional analysis of the cross-examination of trafficking complainant

The central focus of this article is that the cross-examination in question amounts to a breach of the guiding principle of factual accuracy. The following two sections, however, provide two further grounds on which questioning a complainant on their free movement may be critiqued.

Contravening the ‘spirit of Palermo’

There is certainly a discussion to be had about how the prevalence of the type of questioning, outlined in the interview extracts, fits with the general principle, emanating from international law, that the consent of a trafficking victim should be treated as irrelevant.¹¹ As has been outlined above, questioning on a complainant’s free movement seems to fit within the framework established by the MSA. However, as a signatory to the Palermo Protocol, the UK also has accepted that the consent of trafficking victim is irrelevant in cases where there is evidence of ‘threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent’.¹² As Gallagher points out, the protocol’s travaux préparatoires affirm that ‘the drafters were pre-occupied that consent would become the first line of defence for those accused of trafficking and that ‘this danger was particularly acute because the Trafficking Protocol sought to capture the more subtle means of control that could be masked by apparent consent’ Gallagher (2017: 95). Thus, to the extent that there is a general principle that consent should be treated as irrelevant, the cross-examination of trafficking complainants, on the degree of freedom they had, during their alleged exploitation, would certainly appear to contravene this principle, in circumstances where there was some form of ‘abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent’.¹³ This rests on the view that the barristers raising of the complainant’s degree of freedom are, essentially, arguing that the complainant cannot have been exploited because they have consented. These provisions seem to be sufficiently wide to cover most scenarios in which an individual ‘freely’ undertakes exploitative work. For example, as is the case in the extract above, individuals agreeing to work in factories, and for their income to go to someone else, have, surely, been subject to some form of abuse of power a position of vulnerability. As such, ‘Palermo’ is clear that their consent should be regarded as irrelevant. In this context, the cross-examination in the interview extracts would seem to contravene the general principles emanating from international law.

It is also interesting to consider scenarios, such as that which is detailed in the extract above, where the defendant is not charged with a trafficking offence, but whose alleged conduct very much resembles trafficking. As is demonstrated above, in these situations, the apparent consent of the complainants can be a crucial matter in the case and, to this end, they may be cross-examined on what opportunities they had to

11. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (adopted 12 Dec 2000, entered into force 25 December 2003) 2237 UNTS, art. 3(b).

12. Ibid., art. 3(a).

13. Ibid.

leave and how much free movement they had. Effectively, this means that the English and Welsh jurisdiction permits potential trafficking victims of trafficking (bearing in mind that they may well still be victims even though their perpetrators may not be charged with a trafficking offence) to be challenged on what consent they had given to be in their exploitative situation, even though the UK has ratified a treaty stating that, generally, the consent of trafficking victims is irrelevant.

'Putting the victim on trial'

Finally, cross-examination on the complainant's degree of freedom seems to have the effect of 'putting the victim on trial' (Calhoun and Townsley, 1991: 65) because it causes the focus of the trial to shift from the defendant to the complainant, and it, effectively, suggests that a victim may have actively participated in, or be deserving of, their victimisation (Calhoun and Townsley, 1991: 65). 'Putting the victim on trial' is, fundamentally, unacceptable and there have been examples of the laws governing cross-examination intervening to prevent it in the past. The UNODC have published a list of 'key considerations for criminal justice practitioners' which states the focus should remain on the acts and intentions of the alleged traffickers (UNODC 2014). The mindset of the of the alleged victims 'should not have a direct impact on decisions about culpability' (Gallagher, 2017: 98). In the cases outlined above, it appears that the exact opposite is the case; the defence's principal line of argument is focused on the mindset of the complainants. As such, the outcome of the case becomes dependent on how factfinders (jurors) view the credibility of the victim. Furthermore, the 16-year-old girl from the first interview extract, involving alleged sexual exploitation in a car park, seems to have been cross-examined about her freedom to leave. This questioning certainly seems to be laced with the suggestion she should be blamed for the situation she was in.

Applying the principle of accurate fact-finding

To determine whether the questioning a trafficking complainant on how much free movement they had, during their alleged exploitation, amounts to a breach of the principle of accurate fact-finding, it is necessary to flesh out what this principle means. Broadly speaking, the principle stipulates that the laws of evidence ought to be constructed in such a way that optimises the prospect of convicting the guilty and acquitting the innocent (Roberts and Zuckerman, 2010: 19).

Whilst obtaining 'accurate verdicts' is not the sole objective in the construction of the law of evidence, Roberts and Zuckerman hold that this principle should never be 'too badly frayed or torn' (Roberts and Zuckerman, 2010: 19). For them, all legal rights and duties are undermined if courts are incapable making factually accurate determinations to enforce them. As such, evidence which is most helpful in reaching an accurate verdict goes some way in promoting this foundational principle. There remains a question of how it is to be decided whether a particular form of evidence is helpful. What qualities should a witness's testimony have for it to be deemed helpful for the jury?

Whilst this is a complicated question to which a definitive answer probably cannot be given, the test used to determine whether a vulnerable or intimidated witness shall be eligible for special measures, under the Youth Justice and Criminal Evidence Act 1999,¹⁴ seems to be a reasonable basis to judge whether evidence is helpful in this way. This criterion can be repurposed to serve as a useful framework for judging the quality of evidence in trafficking cases. Special measures are, after all, partly a product of concerns over the ability of child, vulnerable and intimidated witnesses to give their 'best evidence' (Home Office, 1998: para 3.29).

Eligibility for special measures is limited to situations where the 'quality of the evidence' would be diminished because of fear, distress, a mental disorder, or significant impairment of intelligence and

14. YJCEA (n 3) 1999, s. 16 and s. 17.

social functioning on the part of the witness in question.¹⁵ The legislation goes on to explain that ‘references to the quality of a witness’s evidence are to its quality in terms of completeness, coherence and accuracy’.¹⁶ The YJCEA provides further guidance on what it means for a witness’s evidence to be coherent; it refers ‘to a witness’s ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively’.¹⁷ ‘Completeness’, in this context, presumably refers to the extent to which witness’s evidence contains all the relevant material a jury would need to make an accurate determination and, similarly, cross-examination which, in some way, hinders the jury in reaching an accurate verdict. It is this ‘completeness’ limb that is of use here because, effectively, the questioning of trafficking complainants on their free movement, in the way described in the interview extracts, essentially paints an incomplete picture.

The complainants in the interview extracts as an example may well have had the general freedom to leave their residence; however, as has been discussed above, this fact alone does not have any bearing on whether they have genuinely been exploited. Furthermore, without some explanation that there are many of reasons as to why genuine trafficking victims may have this degree of freedom, reference to this fact paints an incomplete picture for the jury. To optimise their chances of reaching a factually accurate verdict, the fact that the complainant had a degree of freedom cannot simply be put to them unnuanced and without further explanation. This is even more important in light of the evidence that members of the public, from which the jury are drawn, are prone to trafficking myths, including the notion that trafficking victims should, in some way, be physically restrained (Dando et al., 2016). On the basis that the cross-examination in the extracts above leads to an ‘incomplete’ picture, it is argued that it hampers the chances of the jury reaching a factually accurate verdict. It amounts, therefore, to a breach of the guiding principle of accurate fact finding.

Introducing some form of regulation of cross-examination in trafficking cases

As has been discussed in the introduction, there is a precedent for the law intervening to prevent the defence from attacking the complainant’s credibility on topics which are, ultimately, irrelevant to the matter of whether the defendant has committed an offence. It is argued that questioning on the complainant’s degree of freedom, in trafficking and quasi-trafficking cases, fits within this category. It has been demonstrated the complainant’s degree of freedom is not, despite the suggestions made by the barristers interviewed, indicative of an absence of exploitation. As has been argued in the previous section, this questioning amounts to a breach of the guiding principle of accurate fact-finding. As such, it is strongly argued that there is a need for some form of regulation of cross-examination in trafficking trials.

At present, of course, it remains open to the prosecution to rebut the suggestion made by defence that a complainant with a degree of freedom cannot be exploited. They could, for example, draw on the literature referred to in this article or, alternatively, use expert evidence to present a more complete picture of how exploitation can happen in trafficking cases. This is not, however, a reason to not introduce some form of regulation. It is not expected, for example, that the prosecution, in sexual offence cases, should have to explain why the complainant’s sexual history does not suggest that they were likely to be consenting in the instance in question. Rather, the law steps in to prevent the suggestion being made in the first place.

Determining what specific regulatory response should be introduced is a significant task beyond the parameters of this article. However, the remainder of this section suggests a few approaches that might be taken. Undoubtedly, introducing regulation in cases where the defendant is not charged with a trafficking

15. Ibid.

16. Ibid., s. 16(5).

17. Ibid.

offence, but whose alleged conducts very much resembles trafficking, will be difficult to accomplish. Though the free movement of complainants in such cases should not be construed as indicative as evidence of consent, the question remains of how would it be determined which cases necessitate some form of regulation and which do not. It might be desirable to encourage judges to recognise that some trials are trafficking trials in all but name, and then to encourage them, where appropriate, to regulate cross-examination on the complainant's degree of freedom (especially where it is being used to suggest some form of consent). However, this would lead to a situation where the complainant is effectively treated as a potential victim of trafficking even though the defendant is not charged with a trafficking offence. This might be regarded as unfair to the defendant. Thus, careful consideration is needed on how to deal with these instances. This does not take away from the fact, which has been established in this article, that there is a potential breach of the principle of accurate fact finding regarding these cases.

However, introducing some form of regulation in trials where the defendant is charged with a trafficking offence would seem to be a simpler task. A substantive restriction on this topic being raised, modelled on s. 41, may well be an appropriate route. This might, as is the case with s. 41 YJCEA, be accompanied by a series of scenarios in which it is acceptable for the matter of the complainant's degree of freedom to be raised. For example, it might be the case that the complainant's degree of freedom could be included where its exclusion would prevent jurors from hearing all relevant evidence. However, it must be remembered that the complainant's degree of freedom cannot be relevant on the basis that it provides evidence of an absence of exploitation.

Any legal intervention preventing the defence from raising the complainant's degree of freedom must, of course, not deny a defendant the right to a fair trial. The defendant's ability to challenge the evidence against them is fundamental part of the right to a fair trial¹⁸ and, therefore, restrictions on what can be asked may potentially veer into risky territory. The key case examining the relationship between restrictions on cross-examination and the right to a fair trial is that *R v A (No. 2)*.¹⁹ The House of Lords held that s. 41(3)(c) of YJCEA was to be construed by having regard to the interpretative obligation under s. 3 of Human Rights Act 1998. This requires all legislation to be read in such a way which is compatible with the rights outlined in the European Convention on Human Rights. The relevant provision of the convention is Article 6, which guarantees a right to fair trial. This is a fundamental and absolute right from which there can be no derogation. In Article 6(3) there are a series of supplementary rights including the right 'to examine or have examined witnesses against him'.²⁰ As such, in *R v A (No. 2)*, the House of Lords stated that 'parliament, by placing restrictions on the questions that may be asked and the evidence that may be adduced by or on behalf of the accused was entering upon a very sensitive area'.²¹

However, they went on to recognise that Article 6(3)(d) can be subject to modification and restriction where the restriction or modification in question pursues a legitimate aim and the means employed are proportionate to that aim.²² Lord Slynn of Hadley stated the restrictions on cross-examination in sexual cases were serving a legitimate aim by seeking to address the prevalence of unreported rape and sexual offences.²³ The question of whether a restriction is proportionate is determined by asking if it goes beyond what is necessary to accomplish the aim in question.

An intervention which prevents the defence from putting misleading information to jurors and, in the process, enhancing the prospect of bringing traffickers to justice would almost certainly come within the

18. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art. 6.

19. [2001] HRLR 48.

20. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art. 6(3)(d).

21. [2001] HRLR 48 at [90].

22. Ibid.

23. Ibid.

definition of a 'legitimate aim'. However, it might be the case that less drastic measures could be implemented to address the problem and, therefore, a substantive restriction may be considered a disproportionate response. For instance, some form of judicial warning to the jury might address the problem. Such a warning could, for example, explain why the level of freedom that the complainant had does not indicate a lack of exploitation. How effective this mechanism could be might also be a matter for future study.

Conclusion

This article has established that alleged trafficking victims are cross-examined on their degree of freedom they had during their alleged exploitation. In this sense, it has sought to build on the existing literature on 'victim credibility' as a hurdle to successful trafficking prosecutions. It has outlined why such questioning is problematic and, crucially, started a debate on how the rules of evidence might be amended to help address this problem. It has been argued that there is a *prima facie* case for some form of restriction, with exceptions, on the raising of this topic during the cross-examination of trafficking complainants. However, it is recognised that alternative approaches may be more proportionate. Whether and how the law of evidence should seek to address the attacks on the credibility of alleged trafficking victims is a subject missing in the current body of literature and, therefore, future work may consider the possible alternative options in detail.

Why, specifically, should the law of evidence introduce a special regime for trafficking in persons trials? It might, for example, be the case that inappropriate and misleading questioning can be found in trials of defendants charged with various offences. However, as outlined in the introduction, human trafficking has long been recognised as a complex, and often misunderstood, crime and is the subject of several myths. For this reason, a 'specialised' criminal justice response to trafficking has been recommended and implemented (Gallagher and Holmes, 2008: 319). Up to this point in the global fight against trafficking, this tendency towards 'specialisation' has manifested in the development of specialist policing (Gallagher and Holmes, 2008: 323). Broadly speaking, this article proposes an extension of this strategy to the trial stage of the criminal justice process. On this basis, it is argued that it is justifiable for the laws of evidence to have special regard for trafficking cases, and to ensure that questioning of trafficking complainants is conducted appropriately and in such a way that ensures the jury has the tools to reach a factually accurate verdict.


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