CRIMINAL LAW NEWSLETTER

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MEETING THE CHALLENGE OF VULNERABLE WITNESSES

The pilot scheme for the pre-recording of cross examination of vulnerable witnesses ends in October 2014. As evidenced by the CPS celebration of convictions under the pilot[1] the expectation is that this measure will be rolled out across the country once the review of the pilot is complete (due summer 2015). This is just part of a sea change in the way that vulnerable people (both defendants and witnesses) are being dealt with by the criminal justice system. For most of us the reason for these changes is self - evident. Those we come across within the criminal justice system, either as defendants or witnesses, are often the most vulnerable due to their life experience and / or intellectual functioning. However, as well as giving vital assistance to those in need, the ways in which these vulnerabilities are being accommodated require step changes in both case management and advocacy. It is vital that criminal practitioners keep abreast of these changes and consider how best to use and manage them.

Pre-Recorded Questioning

In the pilot scheme pre-recorded cross-examination under s28 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA) was available to all those who were under 16 and those with a mental or physical disorder which was likely to result in their evidence being diminished. However it was noted that the Ministry of Justice would 'look at including vulnerable victims of the most serious crimes like rape and sexual violence as part of

[1] http://blog.cps.gov.uk/2014/09/dpp-welcomes-convictions-under-pilot-scheme-of-pre-recorded-cross-examination-of-victims-.html

any roll out'[2] (ie extending it to those qualifying under s17 of YJCEA).

One thing to note with s28 cases is that the early stages are key. With crown court cases the prosecutor must notify the court and defence that it is a s28 case at the first hearing with an expedited timetable following. Two hearings of fundamental significance will take place prior to PCMH - the ground rules hearing and the s28 hearing. Any bad character or s41 application is to be made before the ground rules hearing. The ground rules hearing will address the nature of questioning and also, in multi handed cases, whether more than one advocate will be permitted to cross examine for the defence. At the s28 hearing the cross examination and re-examination will be conducted. After this the court can only permit further cross examination / re-examination if the party applying has since become aware of a matter which that party could not with reasonable diligence have ascertained before the s28 hearing, although there is also an 'interests of justice' catch all provision[3].

In light of the importance of the pre-PCMH stages good early disclosure will be vital. It is envisaged that the ABE transcript will be served 7 days prior to the preliminary hearing and the evidence within 21 days of the preliminary hearing. This will no doubt prove challenging, as cases involving vulnerable witnesses will often also involve a need for disclosure of education, social services and family court records. There are two sources of useful guidance re disclosure. There is the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases[4], paragraph 9 of which encourages a Judge to use the preliminary hearing to impose an early timetable for disclosure and consider matters that may require a third party application or joint criminal / care directions hearing. In addition there is the framework for obtaining disclosure from local authorities in child abuse cases as set out in the 2013 Protocol and Good Practice Model[5]. This again is a useful model for those prosecuting and a useful reference for the defence in pursuing disclosure.

What will also be key is an early conference with the client to identify all

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[2] https://www.gov.uk/government/news/first-victims-spared-harrowing-court-room-under-pre-recorded-evidence-pilot

[3] s28(6)

[4] http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Protocols/Disclosure+Protocol.pdf

[5] http://www.cps.gov.uk/publications/docs/third_party_protocol_2013.pdf

areas of cross examination, including of course the inevitable Facebook comments and other social media communication that seem to be a common feature necessitating further disclosure requests. It is worth noting that paragraph 23 of the Judicial Protocol states that defence requests for disclosure should be set out on a s8 form even if no hearing is sought initially. Compliance with this will no doubt focus minds and avoid judicial criticism. All this before PCMH!

The difficulty with this front loaded approach is that defence counsel must be identified early and maintained - it will be interesting to see how the pilot schemes have coped with these disclosure and listing issues.

Intermediaries

Another means to accommodate the vulnerable in the criminal justice system is the use of intermediaries. This is a special measure available under s29 of the YJCEA, available to those who qualify on the grounds of age or incapacity. Again early identification is crucial. In theory for prosecution witnesses the police should identify those who could benefit from the assistance of an intermediary before the ABE. This enables the intermediary to do an initial report to assist in the planning of the ABE and assist and possibly intervene in the ABE. After the ABE the intermediary should then write a report for the court before a ground rules hearing to set the nature and limits of questioning. The intermediary then attends trial to give an agreed level of assistance.

At present the legislation specifically excludes the defendant from the statutory scheme[6] however defence witnesses can take advantage of it. Defence solicitors can therefore obtain intermediaries for defence witnesses through the statutory matching scheme by emailing socwitnessint@nca.x.gsi.gov.uk.

Although excluded from the statutory scheme certain vulnerable defendants can also have an intermediary. This is vital considering that, for example, 16% of people placed in custody meet one or more of the assessment criteria for mental disorder[7]. If a Judge expresses reluctance to do this it is worth reminding them of the Practice Direction [2007] 1 W.L.R. 1790 which emphasises that with regard to vulnerable defendants in criminal proceedings *'All possible steps should be taken to assist a vulnerable defendant to understand and participate in those proceedings'*. In

[6] s16(1) f the YJCEA

[7] M Maguire, 'Not a Marginal Issue: Mental health and the criminal justice system in Northern Ireland' (2010) Northern Ireland: CJINI)

addition there is the case of R v D [2014] 1 W.L.R. 525 which emphasises the need for a Judge to ensure that a vulnerable defendant can actively participate in his or her trial.

The granting of intermediaries for defendants arose through case law[8]. This was based on the court's inherent jurisdiction to ensure a fair trial. Funding for this has, since October 2013, come from central funds.

When s104 of the Coroners and Justice Act 2009 inserts s33BA into the YJCEA there will be a statutory basis for the provision of intermediaries for defendants, (no date given as yet for this). Under the new legislation eligible defendants are those under 18 who would be assisted because of issues with intellectual or social functioning or those over 18 with a mental disorder or significant impairment of social or intellectual function[9].

Often the route to an intermediary is through a psychologist's report suggesting the use of an intermediary, followed by the obtaining of an intermediary's report identifying whether the defendant needs assistance and if so what kind of assistance. There should then follow the same ground rules hearing before trial as well as assistance by the intermediary during trial. This therefore requires early identification of a defendant in need so the relevant reports can be obtained.

Although courts have often been providing intermediaries for defendants for the whole of a trial the forthcoming legislation provides only for the examination of the defendant through an intermediary. This was highlighted and approved in the recent case of OP[10] and therefore it is likely that from now on it will be an uphill struggle to persuade Judges to grant an intermediary for the whole of the trial and once the legislation is in force intermediaries, under statue at least, will only be available for the giving of evidence.

The case of OP also brought into question what had been a 'two tier' system'. Although initially registered intermediaries were provided for both witness and defendants by the Ministry of Justice in summer 2011 the Ministry of Justice decided to meet only its obligations under s29 of the YJCEA

[8] R v S.H. [2003] EWCA Crim 1208, C v Sevenoaks Youth Court [2009] EWHC 3088 (Admin)
[9] s33BA(5) and (6)

[10] R. (on the application of OP) v Secretary of State for Justice [2014] EWHC 1944 (Admin)

and therefore stopped matching defendants with intermediaries. Since then two systems have co-existed, with witnesses other than the defendant being given registered intermediaries and defendants having to find their own non-registered intermediaries. The difference is that registered intermediaries are regulated and have to meet strict requirements with regard to their education; their professional training and development, data protection and professional indemnity insurance as well as having to notify the regulatory body of any criminal investigations or proceedings against them or complaints about them. In addition their skills are matched by the MoJ with the needs of the witness. Non-registered intermediaries, in contrast, are unregulated (although of course many provide an excellent and self-regulated service as was recognised by the Court in OP).

A refusal by the Ministry of Justice to provide a registered intermediary for a defendant was challenged in the case of OP and the Divisional Court ordered the MoJ to reconsider its position, potentially reopening this valuable resource to the defence.

Style of Questioning

With both pre-recording cases and case involving intermediaries the nature of questioning will be set out at the ground rules hearing. Judges are also becoming more interventionist with regard to style of questioning in cases without these particular special measures. It is therefore vital that advocates are familiar with both the case law and 'toolkits' in this area.

The case law developed in a series of decisions from around 2010. These cases considered whether the mode of questioning in which the defence case is put robustly to a witness, including any assertion that they are lying and the inconsistencies in their account, was appropriate in cases involving vulnerable or child witnesses[11]. This has led Judges to place limitations on just how and how much of one's case can be put.

Such restrictions can conflict with the rule that you must not make a serious allegation against a witness whom you have had an opportunity to cross-examine unless you have given that witness a chance to answer the allegation in cross-examination[12]. This has been reconciled on the basis that the rule arises because of the need for fairness to a witness, and putting an

[11] Barker [2010] EWCA Crim 4; W & M [2010] EWCA Crim 1926

[12] Rule Rc7 at p25 of Bar Code of Conduct

allegation to a witness who would not understand it can hardly be called fair.

However the restrictions can lead to difficulty for example if a co-defending counsel does not follow the rules or juries who have seen other cases are left wondering why certain matters aren't being put. To counter this it is useful to refer to R v Wills [2011] EWCA Crim 1938 which made it clear that where limitations have been placed on counsel the Judge should, where appropriate, explain them to juries; further that if one counsel has not stuck to the rules that should be pointed out by the Judge to the jury, and preferably soon after it has occurred; and finally that, inconsistencies of witnesses that could not be put to them be highlighted soon after the witness has given evidence instead of this being left to closing speeches.

Moreover it is not simply issues of whether and how one puts one's case that arise in such ground rules hearings and vulnerable witness trials. Also there are directions regarding the wording, pace and tone of questioning. This involves an inherent shift in advocacy style that the Court of Appeal has acknowledged is a difficult one[13]. A failure to make the shift can lead to confusion or judicial intervention which can be damaging to one's case. To assist in this various 'toolkits'', training and reports[14] have been developed which should be referred to in preparation for trials involving those who are vulnerable. Throughout such preparation it must be remembered that questioning styles must also be moderated for vulnerable defendants.

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[13] R v F [2013] 2 Cr App R 13

[14] go to http://www.theadvocatesgateway.org for toolkits and reference to a wide range of resources

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