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# CRIMINAL LAW NEWSLETTER

*June 2017*

## VULNERABLE WITNESSES

The recent BBC showing of “Three Girls” – the dramatisation of the Rochdale child sex abuse/trafficking case, brought to light the issue of the cross-examination of vulnerable witnesses. It is unfortunate that, despite huge amounts of work being done by the judiciary and the bar over the last year or so, this showing has publicised practices of some 5 years ago, outraging the public about the behaviour of advocates when cross-examining vulnerable teenage girls.

The programme, which took the court scenes directly from court transcripts, showed barristers cross-examining teenage girl witnesses and asking questions such as: “You were going out with a group of girls at night, were you not?” “You were freeloading, were you not....getting free alcohol?” “You’re the prettiest of the girls, are you not?” “The reality is this, is it not, that you feel profoundly guilty about what has gone on” “You described [this man] as small, I think that’s his height you’re talking about there, is it not?”

One girl with learning difficulties, who was 13 at the time she was abused (and made pregnant) by a 42 year old married father, was asked a string of “tagged” questions – “You thought Billy was your boyfriend and you liked him a lot, yes?” “As time went on, you felt like you were in love with him, did you not?” “You’ve talked about cuddling up with him, having a laugh, and having nice sex, have you not?” to which she simply agreed.

The sorts of comments that this has provoked on social media include: “Please explain how barristers can represent such scum and try to discredit rape and abuse victims like that” “To suggest because a young girl drinks cider or hangs out with her friends on the street, she was asking for it, is a disgrace” and “I can understand why victims don’t come forward”.

There are of course two different issues here. The issue of how or why barristers represent any client is a fundamental part of our code of conduct, and indeed the principle of access to justice for all. But the question of how vulnerable witnesses are treated in court is a different issue altogether – one which has been addressed by the bar, but perhaps not in a way in which the public will become aware, until they begin to see it in practice.

In May, three members of Devon Chambers have acted as facilitators to provide training in the cross-examination of vulnerable witnesses to advocates from across Devon and Cornwall. This has been part of the Inns of Court College of Advocacy National Training Programme on Advocacy and the Vulnerable, running from 2016 to 2018. The training programme has been “designed to ensure that all advocates, when dealing with vulnerable witnesses, understand the key principles behind the approach to and questioning of vulnerable people in the justice system, irrespective of the nature of the allegation, or the jurisdiction in which the advocate appears”.

The programme aims to deliver training to over 14,000 delegates and will become mandatory for any advocate wishing to undertake publicly funded work for serious sexual offence cases involving vulnerable witnesses.

There is insufficient space within this newsletter to cover every element dealing with vulnerable witnesses under this new approach, so I will just cover some key areas:

## Intermediaries

The rules for the use of intermediaries have recently changed and are set out in the Criminal Practice Directions. It used to be that intermediaries were automatic for any child of primary school age. Now there is no presumption of an intermediary, but they should be considered for anyone under the age of 18. Intermediaries should also be used in any case where the witness has special needs in relation to communication or where the witness has learning difficulties which may impact upon their ability to give evidence.

## The Ground Rules Hearing

If there is a vulnerable witness, there will always be a Ground Rules Hearing prior to the trial, irrespective of whether the witness requires an intermediary or not. If they do require an intermediary, that intermediary must be present at the Ground Rules Hearing. The advocate at that Ground Rules Hearing should always be trial advocate. The issues to be covered at a Ground Rules Hearing will include: the length of cross-examination, the nature of the questioning and what questions are appropriate in the circumstances of the particular witness. Some Ground Rules Hearings will involve the advocates preparing their questions and submitting them in writing before the hearing; that is more likely when the witness is particularly young. The hearing will also consider the limitations to be put on “putting the defence case”. Authorities now suggest that it is not necessary to put the defence case – but that does not apply in all cases, and it is a matter for the judge to decide, at the Ground Rules Hearing, depending on the particular witness. In a multi-handed trial, the judge will decide which advocate is to cross-examine the witness and what, if any, questions may be put by the other advocates, in order to avoid repetitive questioning.

## Section 28 hearings

Section 28 of the Youth Justice and Criminal Evidence Act 1999 allows for cross-examination of witnesses to be video-recorded, in the same way that section 27 provides for examination in chief. This is currently only happening in some pilot areas, but is likely to be rolled out nationally. The pilot has been used for witnesses under the age of 16 or those suffering from a mental disorder or otherwise having a significant impairment of intelligence or social functioning. One useful finding from this pilot is the best way to deal with cross-examination based on a prepared and agreed list of questions, when the witness gives an unexpected answer. The pilot has shown that, rather than continue the cross-examination, going off script, the exercise is more successful if the advocate asks for a break and then prepares and agrees (with the judge) a new set of questions that flow from the unexpected answer.

## The principles of questioning vulnerable witnesses

These are some of the fundamental principles that form the basis of the training that advocates are now receiving:

- All witnesses are now considered competent. It is for advocates to ask questions in a way that the witness will understand them, and to put them in language which is witness friendly.
- Counsel cannot rely on “putting the defence case” as an excuse for putting questions which will distress or intimidate a witness (*R v Lubemba [2014] EWCA Crim 2064*). This is not to say that the defence case need not be put, but it should be put in a user-friendly way.
- Children are more suggestible than adults – it is not proper cross-examination to put a proposition to them to which they are simply likely to say “yes”.
- There is no need for the advocate to build rapport with a vulnerable witness at the beginning of cross-examination. The judge will have already done this, and advocates should simply signpost “I’m going to ask you questions about X” and then go straight into the questions.
- Ask questions in a chronological order – usually this will be working forwards, but may occasionally be in reverse chronological order. But it must be logical and not confuse the witness by jumping to and from different times.
- Do not use pronouns – do not ask if “he” did something, use the person’s name in every question.
- Ask questions at a pace that is suitable for the witness, and allow more time for them to respond.
- Ask questions, do not put statements in a questioning way.
- Signpost when changing topics (“I’m going to ask you some questions about Y now”).
- Avoid repetitive questions.
- Do not put questions in a way that suggests approval or disapproval.
- Do not ask a vulnerable witness if they remember something. Rather than “do you remember X happening?” ask “did X happen?”
- Do not ask tag questions. Rather than “X did happen, didn’t it” ask “did X happen?”
- Do not ask compound questions. Rather than “did you do X and then Y?” ask “did you do X?” and then “did you do Y?”.

All criminal barristers at Devon Chambers have now been trained in cross-examining vulnerable witnesses and are committed to applying the principles underlying this new approach. Please contact any of our team if you would like to find out more.

**Sally Daulton**

## Upcoming Events

**Chambers is hosting a presentation on behalf of the National Probation Service:**

**Wednesday 14<sup>th</sup> June 2017 from 5pm at Jurys Inn, Plymouth**

**As from 31<sup>st</sup> July 2017 our new address will be:**

**8, The Crescent, Plymouth PL1 3AB**