

mission proposed (1) a category of second degree murder to cover killings intended to cause serious injury, or intended to cause injury or fear of injury but where D knew there was a serious risk of causing death and first degree murder where one of the partial defences applies, and (2) a sole “criminal act manslaughter” as a constructive man-

slaughter based on intentional injury or an awareness of a serious risk of injury. Some day we might even get around to admitting that constructive manslaughter should have gone the way of felony-murder and resist the dubious justification for new specialist constructive homicide offences.

Dispensing with the “safety net”: is the intermediary really needed during cross-examination?

By Joyce Plotnikoff and Richard Woolfson¹

Introduction

Some judges now ask, given the overall shortage of registered intermediaries, whether their presence during questioning is really necessary – especially if they attended the ground rules hearing and draft questions have been reviewed, simplified and are relatively few in number. One judge, while acknowledging that intermediaries are essential for cross-examination of some vulnerable witnesses, considers that the decision in respect of others involves a balancing exercise:

We have to work within the facilities we are provided with, which involves compromise and the difficult decisions that some cases have to go ahead in less than ideal circumstances, and without an intermediary at all... I would urge intermediaries to look at the wider picture, just as a judge has to. Can they ask: “Is this a case where it is essential that I am present for both the ground rules hearing and section 28 cross-examination, or can my time be better used assisting this witness to the ground rules hearing, and then assisting another one in the same way, rather than that other getting no assistance at all?”

We invited ten experienced intermediaries to provide examples of the benefits of their presence for questioning at trial and in pre-recorded cross-examination and to consider the potential risks, having contributed to the ground rules hearing, of being dispensed with on the day of the witness's evidence. All quotes below are from intermediaries unless otherwise specified.

Ground rules hearings and advance review of questions

Ground rules hearings must be held in any case where “directions for appropriate treatment and questioning” of a witness or defendant are necessary.² The intermediary “must” be invited to make representations³; in other words, be given the opportunity to participate in the discussion and to explain report recommendations. Submission of written questions for review “in appropriate cases and in particular where the witness is of tender years or suffers from a disability or disorder” is a requirement⁴ of the ground rules hearing for pre-trial cross-examination (s.28 of the Youth Justice and Criminal Evidence Act 1999), a special measure due to be rolled out

nationally.⁵ More generally, the practice of inviting defence advocates in vulnerable witness cases to “reduce their questions to writing in advance” for review has been described as “entirely reasonable” by Lady Justice Hallett.⁶

During the review, the judge can strike out repetitious or irrelevant questions or those that are comment; an intermediary, if appointed, assists the judge to ensure that the defence can put its case in a simple and straightforward way. Cross-examination is shortened. Section 28 pilot courts found advance review to be so integral to the fair testing of evidence that it is being widely adopted in non-s.28 cases with a vulnerable witness and intermediary. Written preparation of cross-examination questions for review is the central plank of the “Advocacy and the Vulnerable” training programme now being rolled out nationally by the Inns of Court College of Advocacy and the Law Society.⁷

Facilitating questioning

What could possibly go wrong? But it went so wrong. I was a wasted resource.

An intermediary's primary responsibility as an independent officer of the court is to facilitate communication, assisting the judge, advocates and witness “to ensure that they all understand each other”⁸ and “actively to intervene when miscommunication may or is likely to have occurred or to be occurring”.⁹

Even the best planned ground rules hearing cannot anticipate exactly how questioning will unfold. Intermediaries have identified that witnesses have not understood “agreed” questions. Unplanned questions have been asked when advocates departed from those approved by the judge, or they have been asked out of the agreed order, with the final “challenge” asked first.

At the Old Bailey in a recent re-trial, the defence QC failed to stick to the agreed questions. She had said that she might have to add one or two

¹ Lexicon Limited.

² Criminal Procedure Rule 3.9(7)(b); Criminal Practice Directions 3E.2; Toolkit 1 and checklist www.theadvocatesgateway.org.

³ Criminal Procedure Rule 3.9(7)(a).

⁴ Introduction, Section 28 GRH Guidance Note issued for the pilots at Liverpool, Leeds and Kingston Crown Court by HHJs Aubrey QC, Cahill QC and Tapping (September 2014).

⁵ Ministry of Justice press release: <https://www.gov.uk/government/news/greater-protection-for-rape-victims-and-children-at-risk-of-grooming> (19 March 2017). The scope of this announcement was later qualified by the Lord Chief Justice: <https://www.theguardian.com/politics/2017/mar/22/lord-chief-justice-castigates-liz-truss-for-failing-to-defend-judges> (The Guardian, 22 March 2017). See also Hayden Henderson and Michael Lamb *The Section 28 Pilot Study: Effects on Case Progression* [2017] 2 Archbold Review 7.

⁶ Lubemba, JP [2014] EWCA Crim 2064, para.43.

⁷ <https://www.icca.ac.uk/advocacy-the-vulnerable>.

⁸ Lord Judge, *The Evidence of Child Victims: the Next Stage*, Bar Council Annual Law Reform Lecture, 21 November 2013.

⁹ Cox [2012] EWCA Crim 549.

depending on the witness's response. However, she went off script at the first question and used two tagged questions immediately. She had also agreed not to use "Do you remember?" at the beginning of every question, as she had tried to do in the first trial, but found it impossible to leave it out on several occasions.

The defence barrister agreed at the ground rules hearing that my suggestions for re-structuring the questions were acceptable. However, as soon as he started to cross-examine, he deviated from the agreed revised format. I had to intervene and during a break I asked the prosecution to speak to the judge, requesting another ground rules hearing to address this issue. If I had not been there, I doubt this would have happened.

Additional questions may be triggered where an answer is unanticipated, misunderstood or open to more than one interpretation (as when a child, asked whether Mr X "did it", responded: "Mummy said I must tell you that he did.")

On occasion, I've felt that an advocate did not correctly understand the witness's reply. I've had to say to the judge that "I don't think Mr X heard exactly what the child said."

Judges differ as to whether they permit deviation from the agreed list. The academic Laura Hoyano considers strict adherence to previously agreed questions to be problematic in terms of compliance with the right to challenge a witness (Article 6(3)(d) of the European Convention on Human Rights).¹⁰ Some s.28 pilot judges suspend proceedings momentarily in order to decide what follow-up questions should be allowed: if the intermediary is present, these can be framed appropriately. Distinguishing s.28 cases, the Court of Appeal observes that:

"in the generality of cases the court should bear in mind the disadvantages to the defence in prescribing the form of questioning, not least because it may inhibit the development of cross-examination in response to a particular answer".¹¹

In addition to monitoring comprehension, the intermediary also is alert to the impact of body language (e.g. if counsel shakes his head when asking questions), pace and tone:

Even with questions agreed beforehand, there is a tendency for counsel to ask them in a monotone. Quite often I have to repeat the question, change the emphasis or intonation of certain words and use pauses or gesture (e.g. to show "Was he in front of you or behind?") to help the witness understand.

The intermediary's presence is appropriate when the judge has agreed the use of communication aids. However, even where specific aids are not approved in advance, intermediaries may recommend them when communication becomes difficult. These have included letting witnesses write down responses or point to "yes/no/don't know" or other symbols and allowing the intermediary to read out the an-

swers; writing down options posed in the question to help the witness process the information; and providing a doll for demonstration to a five year-old asked the unscheduled question "Where's a man's willy?".

Advocates who attend the ground rules hearing may be replaced on the eve of questioning. This has occurred even in pilot s.28 hearings, where the defence advocate who attends the ground rules hearing "must" conduct the pre-trial cross-examination.¹² In recognition that continuity may not be feasible when s.28 is rolled out, consideration is being given to downgrading the requirement for continuity to be merely "desirable". In such instances, intermediary engagement on the day of cross-examination with the replacement advocate is essential.

Intermediaries also advise about any questions to be asked by the prosecutor; issues for re-examination cannot be pre-planned as they only become apparent at the end of cross-examination:

The prosecution barrister's questions were of a sensitive and complicated nature. He asked for my advice on how to word them.

Intermediary responsibilities are not confined to questioning; they help ensure comprehension of instructions and anything else said to the witness.

Addressing the witness's emotional state during questioning

The neuroscience of communication reveals how stress can significantly affect a person's ability to give their best evidence: to understand language, to communicate answers, to process and think logically to remember and to cooperate with court procedures. Problems are compounded when the person is expected to recount traumatic events. Where witnesses were unable to disclose offences for a long period, the process of cross-examination may re-trigger their silence. On the day, the intermediary may need to make fresh recommendations to deal with the witness's state of mind.

A man was so terrified of sitting on the chair facing the camera in the video link room that we had to sit together on the floor while he rocked. I repeated every question to him and he whispered his answers which I then repeated back to the court.

The child said she was nervous so she whispered her answers to me so I relayed them.

I've had instances where a question caused unanticipated distress to a witness. I was able to alert the court to this so that the question could then be modified.

Intermediaries work to establish rapport with the witness over one or more meetings. This level of rapport is unlikely with an usher or Witness Service volunteer whom the witness meets for the first time on the day of giving evidence:

A 16 year-old described herself as "terrified" about not understanding the questions at court. On the day, she managed well and I didn't need to intervene. She said afterwards that having me sit close by and knowing she could tell me if she didn't understand made "all the difference".

¹⁰ Laura Hoyano has drawn our attention to *MacLennan v HM Advocate* [2015] ScotHC HCJAC 128. The fact that the defence advocate was not restricted to pre-prepared written questions in cross-examination was one factor in stating that Art.6 ECHR had not been breached.

¹¹ "This is particularly so if the ruling is made during the course of cross-examination":

SG [2017] EWCA Crim 617. The trial judge ruled that the 18 year-old complainant became "vulnerable" during cross-examination and required submission of the remaining questions before questioning resumed the following day. The Court of Appeal expressed "misgivings as to the course adopted" but dismissed the appeal. [For a summary of the case, see p.3 above - Ed.]

¹² Para.32, *Judicial Protocol on implementation of section 28 YJCEA 1999 Pre-recording of cross-examination and re-examination* (September 2014): "The defence advocate attending the ground rules hearing must be the same advocate who will be conducting the recorded cross-examination."

This relationship of trust gives many witnesses confidence to articulate their own concerns:

On most occasions during evidence the witness will say something to me for me to relay to the court, e.g. they will ask where somebody is, how many more questions are there, that they don't understand or ask for a break.

Some witnesses seek our permission to say that they don't understand, rather than stating this directly to the advocate (e.g. "I don't know who he is talking about...I can't remember that social worker...shall I say that?"). When comprehension monitoring symbols have been agreed by the court (e.g. "I don't know"), the witness may look towards the symbol when they are uncertain, and wait for a cue from the intermediary (e.g. "It's OK to use one of your cards if you need to") before they will state that they can't answer.

Further discussion of ground rules may be necessary during the witness's evidence:

Even the best planned cross-examination can go wrong. For example, in one such case the witness froze completely. The judge asked me to come into court to discuss possible ways to adapt the situation and questioning in order to assist him to give evidence.

When problems emerge during a witness's evidence, intermediary recommendations have included moving the witness from the live link room into the courtroom behind a screen, and vice versa; and moving the advocate into the live link room to question the witness face to face. Where a six year-old refused to continue answering counsel's questions, remaining questions were further simplified with the intermediary's assistance then asked by the judge. Intermediaries often find themselves involved in last minute discussions when witnesses are expected to look at documents or exhibits:

We monitor constantly for issues that may negatively affect the witness so as to alert the judge. In the case of a nine year-old, nothing was mentioned by the defence at the ground rules hearing about visual evidence. During cross-examination, the child and I were told over the live link that counsel wanted to show a video of the house showing the different locations of alleged sexual assault and featuring someone with a duty of care for the child at the time of the alleged offences. The child was not prepared for this. I felt it would have seriously distressed her and would therefore have affected her willingness to cooperate and give evidence. During a break, I raised my concerns with prosecution counsel and asked him to address the matter with the judge.

Just before the section 28 hearing, I was told that the witness was going to be shown photos. When I explained this, she made it very clear that she didn't want to look at them so I alerted the judge.

A vulnerable woman in her 20s could only whisper "I can't remember" with increasing distress to everything she was asked. The judge asked me to read out to her (she couldn't read) a section of her written statement. This seemed to "unstick" her and she coped with the rest of the questioning.

Individual children, even those developing normally, and vulnerable adults cope emotionally with cross-examination in unpredictable ways. Sitting alongside the witness in the

live link room (with both always on screen), the intermediary is best placed to pick up subtle body language and physiological indications of anxiety, dissociation, distress,

fatigue, withdrawal or lack of attention. These are often not apparent over the live link to those in court. Intermediaries can indicate whether a short break of a couple of minutes (in which the jury remains in court) is sufficient, or if the witness needs a longer rest. During breaks they also provide activities tailored to the witness's needs and interests to reduce stress, contain potentially disruptive behaviour and enable the witness to reconnect with the questioner. Those in court are unlikely to be aware of the importance of such activities in enabling some witnesses to continue. While it is primarily the usher's responsibility to bring technological problems to the court's attention, intermediaries also flag concerns affecting the witness's use of the live link. These have included poor sound quality, distractions caused by those in court looking through files or typing noisily and seeing the defendant on screen:

When practising camera angles on the day of a frightened teenager's evidence, I realised that when the court camera swung around the courtroom, it gave a full view of the dock and public seating. The usher had never noticed this before.

At the close of the witness's evidence, the judge may direct the intermediary to assist in the taking of a victim's personal statement if this has not previously been done.

Waiting to give evidence

There can be benefits from the intermediary's presence before questioning starts, especially when vulnerable witnesses experience long delays. While pilot courts significantly shortened court waiting times in s.28 cases¹³, maintaining tight schedules will be a challenge for national rollout. Even strict timetabling may go awry. While waiting, intermediaries help witnesses to remain as calm as possible:

Often a fair bit of my work is done before we go into the live link room, managing anxiety levels and finding out what the signs are that I need to be alert to when questioning starts.

In a section 28 hearing, I helped settle a nervous 13-year old whom the police had to bring to court as he was threatening to run away. The equipment didn't work. We finally all went home at 2pm, to return the following week. When he came back to court, he was even more anxious and ran out of the live link room at one stage. I managed to get him back in to finish his evidence by using stress-relieving techniques, including slow-in and regulating his breathing.

While waiting, the intermediary may identify key information:

Just before the witness gave evidence in a section 28 case, she told me that she didn't want one of the defendants to be referred to as "Dad" but by his first name. I passed this onto the judge.

Sometimes the presence of family members or a witness supporter can be counter-productive:

I didn't want the child waiting with her parents and grandparents who were a bag of nerves. Anxiety was a big issue for this child who had not been sleeping.

¹³ On average, almost an hour less than children in the non-s.28 comparison group: Hayden Henderson and Michael Lamb *Pre-recording Children's testimony: Effects on Case Progression* [2017] 5 *Criminal Law Review* 345.

I've had to jump in when a supporter said to the witness: "The barrister is out to trick you, so beware!" and when another told off a mentally ill witness, just about able to take her medication in the morning, for "not starting the day with a proper breakfast".

Intermediaries routinely facilitate introductions to the witness and ensure that explanations are understood. Conversation can be facilitated through play or topics that the intermediary knows will engage the witness:

I sometimes have to minimise the "traffic" of professionals coming to introduce themselves to the witness, when it is clear that this is overwhelming.

Some judges and advocates continue to use legal language at this stage when much simpler vocabulary is required.

Conclusion

Registered intermediaries for witnesses remain a scarce resource in the justice system, but not necessarily an expensive one.¹⁴ More effective management of requests for intermediaries could result in better targeted allocation.¹⁵ Time could also be freed up for their use in other cases if their trials were listed as fixtures, as intended,¹⁶ with a schedule for their witness to give evidence, rather than asking them to block out a week or more in their diaries for trials in warned lists.

Criminal Procedure Rules and Practice Directions expect courts to take "every reasonable step" to facilitate the participation of witness or defendant, especially in intermediary cases.¹⁷ Section 29 of the Youth Justice and Criminal Evidence Act 1999¹⁸ creates a presumption that the intermediary who assessed the witness's communication will be present while (s)he gives evidence provided the intermediary recommends this as necessary. If the presumption is to be reversed, the intermediary should have the opportunity at the ground rules hearing to justify their presence during questioning. As with any special measure, the witness's preference is key: witnesses are asked whether they wish the intermediary to accompany them during cross-examination; they are advised that it is the judge's decision whether this will happen. When overriding the witness's wish for intermediary assistance, the judge should take account of the potential reaction to the intermediary's absence.

Quality of advocacy for the vulnerable is in a state of flux. The best is superb, and the general standard is improving, but the gap between best and poor practice has never been wider. Advocates in whom judges have confidence are sometimes replaced at the last minute by others less skilled. Rollout of the "Advocacy and the Vulnerable" training programme under the auspices of the Inns of Court College of Advocacy and the Law Society is only just getting under-

way. (While intermediaries contributed to development of the materials, they have, unaccountably, not been invited to contribute to training delivery.) The programme has been met with some degree of resistance by lawyers.¹⁹ The Judicial College has been in the vanguard of vulnerable witness training, but judicial control of inappropriate questioning remains inconsistent, with at least some judges over-confident of their own abilities to identify and simplify complex questions. For example, a judge who excluded an intermediary from the review of questions approved the following:

If I said that Kelly told you that if you said Sam did something to you, she would get some money. Do you agree? (a 24-word double hypothetical leading question, to be posed to a five year-old witness).

Shaun Smith QC, a governor of the Inns of Court College of Advocacy, a lead facilitator in the Bar's vulnerable witness training programme and a Judicial College tutor, recognises the welcome improvements in how vulnerable people are dealt with by both judges and advocates, but cautions that nonetheless, the road ahead remains a long one:

In that respect, the presence of intermediaries – "the watchmen/women" of this invaluable process – remains essential, not only to assist in the appropriate questioning of the vulnerable, but to ensure that the environment in which they give their evidence continues to be as stress free as possible.

In summary, the intermediary's presence can achieve a range of benefits before and during questioning. There are significant risks in dispensing with them after the ground rules hearing. On occasion, some intermediaries do a disservice to the scheme by failing to intervene during inappropriate questioning (although control remains the responsibility of the judge) or to bring problems experienced by the witness to the attention of the court. Judges or advocates dissatisfied with a registered intermediary's performance (or similarly, who wish to commend their contribution) should contact the scheme's Quality Assurance Board.²⁰ However, intermediary silence during questioning does not, by itself, indicate that their presence was unnecessary. Communication is a dynamic process, reliant on many factors, not merely wording. At its most extreme, intermediaries may help salvage evidence if communication breaks down but their presence also routinely contributes to "best" evidence in subtle ways that may not be apparent to the court. Their skills in safeguarding effective communication are unmatched by other courtroom participants.

Intermediaries share judicial concerns that their time should be used to benefit the greatest number of witnesses. However, it is unrealistic to invite intermediaries to "bow out" after the ground rules hearing when the circumstances in which vulnerable witnesses give evidence are so often unpredictable; in any case, releasing intermediaries at short notice does not inevitably mean they can be re-deployed elsewhere. A more productive strategy would be to free up days "held" unproductively in intermediaries' diaries by scheduling intermediary trials and vulnerable witness testimony with greater certainty. This approach would not penalise vulnerable witnesses, which is the potential outcome of disengaging the intermediary after the ground rules hearing but before cross-examination.

14 The Ministry of Justice pay scale for a registered witness intermediary is £38.36 per hour and £16.90 travelling time. Much confusion and "pushback" has been caused by higher unregulated fees charged by some nonregistered intermediaries for defendants.

15 "In light of the scarcity of intermediaries, the appropriateness of assessment must be decided with care to ensure their availability for those witnesses and defendants who are most in need. The decision should be made on an individual basis, in the context of the circumstances of the particular case" (Criminal Practice Direction 3F.5).

16 "It is preferable that [intermediary] trials are fixed rather than placed in warned lists" (Criminal Practice Direction 3F.28). An increasing number of intermediary trials appear to be floated.

17 Criminal Procedure Rules 3.9(3)(b) and 3.9(6); Criminal Practice Direction 3D.2).

18 The intermediary's function is to communicate: to the witness, any questions put to the witness; to persons asking such questions, the witness's answers; and to explain such questions or answers so far as necessary to enable them to be understood by the witness or the questioner.

19 Lynda Gibbs, programme director of the Inns of Court College of Advocacy, speaking at the Intermediaries for Justice Annual Conference, 5 May 2017.

20 Feedback can be sent via registered.interme@justice.gsi.gov.uk.

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Editorial inquiries: House Editor, Archbold Review.

Sweet & Maxwell document delivery service: £9.45 plus VAT per article with an extra £1 per page if faxed.

Tel. (01422) 888019

Archbold Review is published in 2017 by Thomson Reuters (Professional) UK Limited, trading as Sweet & Maxwell.

Registered in England & Wales. Company number 1679046. Registered office 5 Canada Square, Canary Wharf, London E14 5AQ.

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ISSN 0961-4249

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Typeset by Matthew Marley

Printed in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire, SO40 3WX

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