CHILDREN'S CHAMPIONS /WITNESS INTERMEDIARIES

PENNY COOPER – JUDGES' SESSIONS
MARCH 2016

RT. HON. THE LORD JUDGE, FORMER LCJ E&W

- 'The use of intermediaries has introduced fresh insights into the criminal justice process. There was some opposition. It was said, for example, that intermediaries would interfere with the process of cross-examination. Others suggested that they were expert witnesses or supporters of the witness. They are not. They are independent and neutral. They are properly registered. Their responsibility is to the court …their use is a step which improved the administration of justice and it has done so without a diminution in the entitlement of the defendant to a fair trial.'

- 17th Australian Institute of Judicial Administration Conference in 'Vulnerable Witnesses in the Administration of Criminal Justice', 7 September 2011

THE BACKGROUND

- Intermediaries are creatures of statute
- England and Wales 2003 (pilot for witnesses) 2008 (roll out)
- Northern Ireland 2012 (pilot for witnesses and defendants)
- Code of Conduct – duty to the court
- Professional Obligations and CC Procedural Guidance Manual (2016)
- England and Wales – commenced a pre-recording of cross-examination pilot in Dec 2013
- Australia passed intermediary and pre-recording of cross-examination legislation in November 2015
- *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* (amending the *Criminal Procedure Act 1986)* introduces pre-recording of evidence and children's champions for a specialist child sexual assault pilot scheme; ss84-87 deal with pre-recording and ss 88-90 with children's champions (witness intermediaries); pilot - 31 March 2016 until 31 March 2019

FOCUS IS CHILD SEXUAL ABUSE

- 'The sexual abuse of children is a dark stain on the collective consciousness of every community. The community expects Government and the judiciary to stand up for the protection of children and to deter future child abuse by sending a strong and clear message to perpetrators that such crimes are simply unacceptable.'

  Chair's Foreword, Parliament of New South Wales, Joint Select Committee on Sentencing of Child Sexual Assault Offenders Report 1/55 — October 2014, Every Sentence Tells a Story – Report of Sentencing of Child Sexual Offenders
- 'The perpetrators of sexual abuse are inadequate individuals who control weaker people, often children, for their own gratification. Their behaviour is always an abuse of power and usually a breach of trust. They destroy families and blight childhoods. They create dread in their victims by convincing them that the consequences of speaking out will be worse than the consequences of silence. They create guilt in their victims by persuading them that they have somehow willingly participated in their own abuse.'

  Mr Justice Jackson, in *Wigan Council v M & Ors* (Sexual Abuse: Fact-Finding) [2015] EWFC 6, available at http://www.bailii.org/ew/cases/EWFC/HCJ/2015/6.html

CRIMINAL PROCEDURE AMENDMENT (CHILD SEXUAL OFFENCE EVIDENCE PILOT) ACT 2015

'88 Role of children's champions

A person appointed as a ***children's champion*** (who may also be called a ***witness intermediary***) for a witness is to communicate and explain:

to the witness, questions put to the witness, and

to any person asking such a question, the answers given by the witness in replying to them,

and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.

A children's champion for a witness is an officer of the Court and has a duty to impartially facilitate the communication of, and with, the witness so the witness can provide the witness's best evidence.

ELIGIBILITY – SECTION 89

(3) For the purposes of proceedings to which this Part applies, the Court:

must (except as provided by subclause (4)) appoint a children's champion for a witness who is less than 16 years of age, and may, on its own motion or the application of a party to the proceedings, appoint a children's champion for a witness who is 16 or more years of age if satisfied that the witness has difficulty communicating.

(4) The Court is not required to appoint a children's champion if it considers:

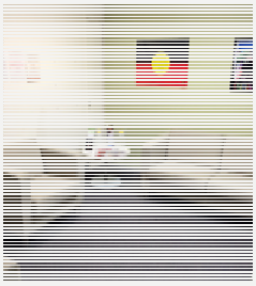
there is no person on the panel established under this clause available to meet the needs of the witness, or

it is otherwise not practical to appoint a children's champion, or

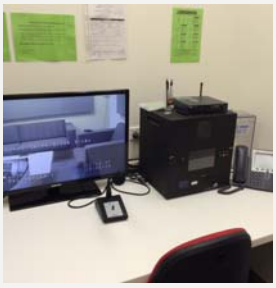
it is unnecessary or inappropriate to appoint a children's champion, or

it is not otherwise in the interests of justice to appoint a children's champion.

WITNESS EVIDENCE STARTS







TRAINING AND ASSESSMENT

- Pilot will be at Downing Centre, Sydney & Newcastle
- 60 children's champions/ intermediaries
- 5 days of training and assessment (written exam, coursework and oral exam)
- Will cover CJS procedure as it relates to the role – focus on cross-examination
- Working with JIRT, assessing the witness, advising the police interviewer
- Assessment report writing (disclosed and used when application for appointment made)
- Being part of the case management discussions
- Witness familiarisation (with WAS not instead of)
- Facilitating communication at court

COMMON MISCONCEPTIONS/ WHAT THE CHILDREN'S CHAMPION IS NOT

The children's champion is:

- Not an expert witness
- Not a witness (third party present when they are with the witness)
- Not a supporter
- Not an interviewer/ second interviewer
- Not a questioner at court (not an 'interlocutor')
- There to support 'best evidence' by facilitating communication
- Is it about the truth? "Truth is subjective but facts are not"

THE ASSESSMENT REPORT AND RECOMMENDATIONS

Would expect the children's champion's assessment report to:

- Accompany the application to appoint/ appoint and order a report
- Be witness specific
- Contain a section describing (with examples) the witness's communication needs and abilities
- Contain a section advising on questioning
- Contain a section of other recommendations which would support the witness's communication of their evidence

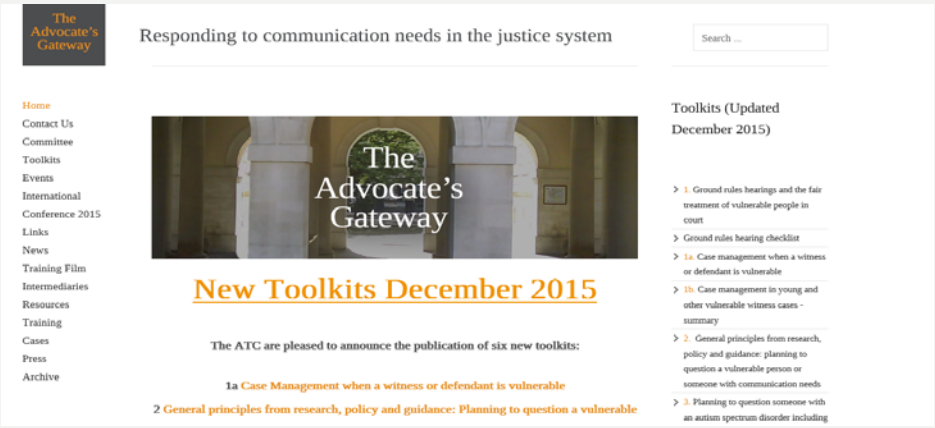
WITNESS SPECIFIC QUESTIONING ADVICE SUPPLIED – JUDGE DECIDES

Questioning Recommendation	Advice for questioner	Rationale	Directed
Be confident about Kai's needs. Ask questions quickly when you have his attention, then wait while he processes the language.	As soon as Kai's attention is gained ask the next question, but once the question is asked count silently to 5 to give him time to process.	Kai needs extra time to process questions once they have been asked.	
Use short clear sentences and simple vocabulary.	Instead of 'I want to take you back to' say 'I want to ask you about'.	Kai will not understand complex sentences or non-literal language.	
Limit questions to four concepts and 'scaffold' additional concepts e.g. with a	Use Kai's drawings to enable clarity if longer questions are needed.	Kai's auditory working memory is limited and it is	

OTHER RECOMMENDATIONS – AGAIN, JUDGE DECIDES

- the judge and advocates together meet Leela in the morning before she gives evidence;
- the children's champion will sit in the CCTV room next to Leela so that they are both visible in court;
- consideration should be given to whether Leela should be accompanied by a witness supporter;
- Leela should have a pen and colouring pencils to hand in case she chooses to draw i.e. show on paper when answering. In this case the children's champion will hold the drawing up to the CCTV camera to show the court and hand the drawing to the usher at the end;
- Leela should have a quiet toy to 'fiddle' with if she becomes anxious;
- waiting time for Leela should be kept to a minimum and at most no more than an hour;
- the children's champion will raise her hand and say 'Your Honour' if a communication issue arises;
- if the court finds Leela's answers difficult to hear this should be indicated and the children's champion will ask Leela to speak up, if Leela is unable

GENERAL GUIDANCE ("EVEN BETTER WOULD BE A SERIES OF WORLD-WIDE TAGS" – MR JUSTICE GREEN)



WE SHOULD BE MOVING FROM THIS

- "The corner shop, is it in a vibrant area?"
- "You are probably a little shaken up at that stage?"
- "What was discussed? This is the sort of thing that you don't not talk about."
- OR
- "Forgive me for asking but back in August last year, were you a slightly different body shape from the way you are today?"
- "You would agree wouldn't you that it is not right that you have just started growing your hair and you have had big hair for quite some time."

A CULTURE SHIFT

- 'It is a truism that change is not just about having a new framework and new legislation in place, but about change in culture necessary to make the new legislation and framework a reality. It is evident in 2015 that some of the ideas that would have seemed radical at the outset of the intermediary pilot have been absorbed into the culture of criminal proceedings. There have been tangible advances in the way advocates and judges deal with vulnerable witnesses and, while there is much yet to be done, I do believe we have achieved real change.'

  Lord Thomas of Cwmgiedd in May 2015 in the foreword to Plotnikoff & Wolfson *Intermediaries and the Criminal Justice System* (Bristol: Policy Press)

- '…victims and witnesses are not volunteers. There has been a paradigm shift in the way we approach their participation and I am confident that in the view of the vast majority of my colleagues a significant contribution to that process has been made by the introduction of the intermediary'

HHJ Topolski (Central Criminal Court) in the forthcoming book Cooper & Hunting *Addressing Vulnerability in Justice Systems* (London: Wildy, Simmonds & Hill)

NOTHING NEW IN THEORY FOR NSW

- *The court is permitted to control the questioning of a witness.* 'The court may make such orders as it considers just in relation to: (a) the way in which witnesses are to be questioned, and (b) the production and use of documents and things in connection with the questioning of witnesses, and (c) the order in which parties may question a witness, and (d) the presence and behaviour of any person in connection with the questioning of witnesses.' Section 26, *Evidence Act 1995.*
- *The court must disallow improper questions put to a witness in cross-examination.* An improper question is one which '(a) is misleading or confusing, or (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).' Section 41, *Evidence Act 1995.*

HHJ PICTON (COURSE DIRECTOR FOR JUDICIAL COLLEGE OF E&W)

- Need to examine the ingrained habits of advocates who cross examine vulnerable witnesses.
- Judicial responsibility to ensure that a fair trial includes giving VWs the chance to answer questions that they understand and so give their evidence properly.
- Many judges were advocates themselves and some have difficulty in stopping questioning that they once did themselves.
- Not easy for advocates to change professional techniques they have spent many years developing.
- Some go for an aggressive approach while others take too long to get to the central issues in a case.
- By the time they get to the key questions the witness is tiring and often desperate to end the whole ordeal.
- Too many introduce questions with comment that should be reserved for the final speech.

ENGLISH LAW

- *R v B* [2010] EWCA Crim 4 - 'age is not determinative'
- *R v Lubemba* [2014] EWCA Crim 2064 - 'Advocates must adapt to the witness, not the other way round.'
- *R v Christian* [2015] EWCA Crim 1582 - 'the intermediary had been seated next to KC with her arm around her whilst the ABE video was being played. ..The jury would have understood the situation as a matter of common sense where they were observing a very obviously vulnerable woman.'
- *R v Boxer* [2015] EWCA Crim 1684 - 'The fact that later the prosecution involved an intermediary who gave advice on the form of questioning does not lead to a conclusion that the guidance was breached at the interview stage.' 'Questions for cross-examination of A were agreed in advance by all concerned with the assistance of the intermediary.'
- *R v FA* [2015] EWCA Crim 209 – 'Questions to be put by [the appellant's counsel] to KK in cross-examination were reviewed by the registered intermediary
- *R v F* [2013] – 'shortcomings of this process seem to us to owe much to a lack of preparation and a lack of ability to respond flexibly'

NOT DEVELOPMENTALLY ABLE TO DEAL WITH 'CONFRONTATION'? *R V E* [2011]

- 'The real complaint here, in our view, is that the defence was deprived of the opportunity to confront C in what we might venture to call "the traditional way". It is common, in the trial of an adult, to hear, once the nursery slopes of cross-examination have been skied, the assertion: "You were never punched, hit, kicked as you have was suggested, were you?" It was precisely that the judge was anxious to avoid and, in our view, rightly. It would have risked confusion in the mind of the witness whose evidence was bound to take centre stage, and it is difficult to see how it could have been helpful. Putting the same thing a different way, we struggle to understand how the defendant's right to a fair trial was in any way compromised simply because Mr Whitehead was not allowed to ask: "Simon did not punch you in the tummy, did he?"' [28]

A SUBSEQUENT CASE WITH A DIFFERENT 6 YEAR OLD WITNESS

The defence case was simply that it didn't happen. Questions defence counsel originally wanted to put:

- Q: D didn't put his willy in your mouth, did he?

With the judge's approval and on the advice of the intermediary, defence counsel's questions were reframed. The traditional statement and tag form was avoided. Instead two simple statements were followed by a simple question for each of the above for example:, e.g.

- Q: You said D put his willy in your mouth.
- D says he didn't put his willy in your mouth.
- Did D really put his willy in your mouth?

TOO DISTRESSED TO CONTINUE CROSS-EXAMINATION? *R V PIPE* [2014]

- Appeal against conviction for sexual activity with a 15 year old, credibility of complainant in issue
- 'Eventually, so tangible was her distress that the judge concluded that the cross-examination should not continue. Having considered the matter further, he decided that the trial could continue.[2] … At the time that the complainant's cross-examination was stopped, the critical element of the appellant's defence had been put to her. It had been made plain to her on a number of occasions that the appellant said that was lying about what she said had happened. [17] … There is no dispute that the complainant was not in a fit state to continue her cross-examination. [22]… The judge ruled that there was no prejudice to the appellant because the records (and thus the inconsistencies) could be reduced to agreed facts and placed before the jury in writing. That is what happened. In our view, the judge was right to reach that conclusion. In cases of this sort, it is often unnecessary and inappropriate for a complainant to be dragged through their own medical records in huge detail, particularly where any potential inconsistencies can be identified and be the subject of written admissions.

NO INTERMEDIARY AVAILABLE FOR TRIAL?

- *R v Cox* [2012] EWCA Crim 549 and more recently in the family court *WSCC v H and Others (Children) (Care proceedings: Brain Injury)* [2015] EWHC 2439 (Fam)
- In *Cox* 'No intermediary could be identified for whom funding would be available.' [9]
- '…the judge asked himself whether, absent the participation of an intermediary, the appellant could receive a fair trial' [14]
- 'The single ground of appeal is that, notwithstanding the care with which the judge approached these issues, and the provision of competent counsel and solicitors, the appellant was deprived of special measures in the form of an intermediary necessary to enable him to play a proper and effective part in the trial.' [15]

THE RESULT IN *COX* [2012]?

- 'We immediately acknowledge the valuable contribution made to the administration of justice by the use of intermediaries in appropriate cases. We recognise that there are occasions when the use of an intermediary would improve the trial process. That, however, is far from saying that whenever the process would be improved by the availability of an intermediary, it is mandatory for an intermediary to be made available. It can, after all, sometimes be overlooked that as part of their general responsibilities judges are expected to deal with specific communication problems faced by any defendant or any individual witness (whether a witness for the prosecution or the defence) as part and parcel of their ordinary control of the judicial process. When necessary, the processes have to be adapted to ensure that a particular individual is not disadvantaged as a result of personal difficulties, whatever form they may take. In short, the overall responsibility of the trial judge for the fairness of the trial has not been altered because of the increased availability of intermediaries, or indeed the wide band of possible special measures now enshrined in statute.' [29]

MULTIPLE DEFENDANTS REPS EACH WANTING TO HAVE THEIR TURN?

- *R v Jonas* [2015] EWCA Crim 562, trafficking and sexual exploitation, both complainants vulnerable and given 'special measures', two defendants
- 'Miss Marsh also took exception to the suggestion that in a multi handed trial with vulnerable witnesses, defence counsel should be treated as a group amongst whom topics and time should be divided. She believed that she was entitled to conduct her own independent cross-examination of whatever length she deemed necessary on behalf of the appellant. The restrictions placed on her, she argued, had an adverse effect on the presentation of the defence case to the jury. The result was that the appellant did not have the fair trial to which he was entitled. She accused the judge of being over-zealous in the use of her case management powers thereby overriding the appellant's rights in order to give priority to the complainant's rights.' [27]
- The Court of Appeal disagreed – it would have been 'unnecessary repetition' [34]

DISCUSSION POINT (1) – TV LINK IS HINDERING COMMUNICATION

- During a familiarisation visit it becomes clear that the witness has poor concentration and difficulty in sustaining interaction across the TV link. The WAS and children's champion accompany the witness to the courtroom but she becomes visibly upset and starts retching and says that she does not want to give evidence inside the courtroom.
- What could the children's champions recommend?

DISCUSSION POINT (2) – OBJECTIONS TO CHILDREN'S CHAMPION

Counsel object to the children's champion involvement at trial saying:

- "There is a tension between the role of the children's champion and that of counsel representing the defendant."
- "There was no children's champion at the interview so we don't need one now"
- "We all have the children's champion report, we are all used to talking to children so let's spare the public purse and not use the children's champion for cross-examination."
- Are these good points?

DISCUSSION POINT (3) – COPING WITH FREQUENT BREAKS

- In another case the children's champion recommends that when the witness gives evidence there should be a break every 20-30 minutes; at the police interview the witness was tired and less coherent in her responses towards the end of the lengthy (90 minute) interview. The children's champion thinks the quality of her evidence is likely to diminish if the witness is fatigued.
- The judge feels it will unnecessarily lengthen the proceedings to agree to the request: "These recommended breaks would interrupt the continuity of questioning, it will unnecessarily lengthen proceedings, getting everyone out and back into court again is a lengthy process. The witness coped at interview. I don't think we really need breaks."
- What is the solution?

INTERMEDIARIES & JUDGES

- 'Yesterday when the judge came to see the witness (adult with Down syndrome) before trial, he was very relaxed, made her giggle at his jokes and told her there were no rude words she couldn't say. She then replied "Can I say f***" and he replied "Of course, you can say f*** as often as you want!" at the end of her XX she clambered up to the bench to shake his hand and thanked him for making her feel so much better'
- '[S]itting in on a sentencing for two defendants who got 25+ years each; being one of a team of more than 30 police, social workers, foster carers, teachers who had got three very disturbed young children through their evidence; hearing the judge close to tears in his summing up'

(Cooper, 2014)

INTERMEDIARIES & CROSS-EXAMINERS

- 'Being in court with a witness who had allegedly been raped. Callous attitude of defence barrister who commented "oh we will have to get the tissue box out" while waiting for the witness to come in. Relentless and totally insensitive questioning of the witness, during which the judge did not intervene, and the prosecution did so only once. The witness turned to me and said, in amongst floods of tears "This is sick" and later "I feel dirty, I want a wash". And I could do nothing as the defence were not breaking any of the ground rules/recommendations.'
- '…on the suggestion of the prosecution barrister, the defence willingly ran all the questions, to be put to a 7 year old, [past] me. After reading the relevant toolkits over a weekend she then asked to go through some more questions. The cross examination was then only 10 minutes long. In another trial the defence asked for my advice as to how to phrase questions'

(Cooper, 2014)

LOOKING INTO THE FUTURE….

Re D (A Child) (No 3) [2016] EWFC 1

'I have referred above to the fact that the mother has a learning disability and that the father has a more significant cognitive impairment. Each has had the benefit of an exceptionally able, committed and dedicated legal team…and, in addition, the invaluable assistance throughout the hearing of an intermediary. I have been anxious to ensure that the hearing was conducted throughout at a pace and generally in a manner which suited the parents and which enabled them to participate fully and effectively at all stages. We had breaks whenever either parent asked for one.' [19]

'Without the help of their lawyers *and* their intermediaries, there is no way in which these two parents could have had a fair hearing.' [20]

JUDICIAL ROUTE TO EFFECTIVE USE OF AN INTERMEDIARY

- Must appoint if witness under 16; if 16 or over discretion where 'difficulty communicating'
- Directions in respect of questioning and other recommendations
- Encourage counsel to work together with the intermediary
- Let intermediary help counsel find a way to put the case
- Directions to jury
- Intermediary declaration at the start of the evidence
- Intermediary next to the witness and visible
- Be clear in advance about the how and for what reason the intermediary should intervene
- Control cross-examination

FROM A VERY NEW INTERMEDIARY

- 'I have worked as a Speech and Language Therapist with children and adults with learning disabilities for 14 years…I have only been working as an RI for a relatively short period (since November 2015) but have felt more valued than I ever did working as a SLT for 14 years. I love the fast moving nature of the work - you do your assessment & make recommendations which are put into place within a few days (during the ABE) or a few weeks/months (during a trial). So far every police officer and solicitor I have worked with has said that they thought it was highly unlikely they would have got anywhere during the ABE or trial without my assistance.

  I left my NHS job the end of January to work as an RI full time. It's the best decision I've ever made. I go to bed every night feeling like I've made a difference. I love the pace and variety of the work. I enjoy the challenge of coming up against a sceptical police officer who has the attitude of 'I've done this for 15 years, I've only asked for an RI because I have to' and then being able to turn around their opinion of our role.'

  A is a Registered Intermediary, Feb 2016

FURTHER READING (RESEARCH)

- Cooper, P. Intermediary Podcast Interviews and Surveys 2010 – 2014 (UK)
- Powell, P. ,& Milne, R. (2015) 'Lost in the detail: Prosecutors' perceptions of the utility of video recorded police interviews as rape complainant evidence', *Australian and New Zealand Journal of Criminology*
- 'In our research, children who were supported by an intermediary at interview recalled a substantial amount more than children who did not receive intermediary support,withouta corresponding decrease in the accuracy of the information.' Prof Dr Lucy Henry and Dr Laura Crane, City University London – email January 2016 – paper forthcoming
- Focus on Survivors: Identifying barriers to accessing support for those who have experienced childhood sexual abuse (2015)

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