

Capacity, Competence, Clients and Witnesses

Tuesday 3rd November 2015

Professor Penny Cooper
Barrister, Academic Associate,
39 Essex Chambers

Maximising communication with and participation of vulnerable clients and witnesses

- What is available - legislation and practice guides
- Let's start with crime and family...everyone else is playing catch-up

Youth Justice and Criminal Evidence Act 1999*

‘Special Measures’

- Eligibility s. 16 (age or incapacity) and s. 17 (fear or distress about testifying). Special measures in sections:
 23. Screening witness from accused.
 24. Evidence by live link (plus ‘supporter’ if needed)
 25. Evidence given in private.
 26. Removal of wigs and gowns.
 27. Video recorded evidence in chief.
 28. Video recorded cross-examination or re-examination. (Currently being piloted in CCs in Kingston, Leeds and Liverpool))
 29. Examination of witness through intermediary. (Only for s. 16 witnesses)
 30. Aids to communication. (Only for s. 16 witnesses)
- * N.B. YJCEA also contains for example chapters imposing restrictions on cross-examination of a child/ complainant by the accused and restrictions on questions about the complainant’s sexual history

The ‘intermediary’

*‘The function of an intermediary is to communicate—
(a) to the witness, questions put to the witness, and
(b) to any person asking such questions, the
answers given by the witness in reply 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.’*

- Section 29 (2) the Youth Justice and Criminal Evidence Act 1999.

What does the intermediary do in the CJS?

- Get trained and MOJ registered, get matched to a witness, get instructed by the police/ CPS
- Gather information about the witness's communication needs
- Assess the witness
- Write a report about the witness's communication needs
- Advise the police/ social worker conducting the ABE interview
- Help set up and attend the witness court familiarisation visit
- Advise the judge and advocates about communication and special measures
- Attend the GROUND RULES HEARING to help the judge make the case management arrangements for the witness

Ground Rules Hearings

- In ***R v Lubemba (2014)*** the Court of Appeal Criminal Division underlined that it is the judge's duty to control questioning and if a witness is vulnerable there should be a ground rules hearing, 'save in very exceptional circumstances'.
- **In April (2015) the Criminal Procedure Rules were amended in light of research (Cooper, 2014).** At CPR 3.9.7 under 'Case preparation and progression' it states:
'(7) Where directions for appropriate treatment and questioning are required, the court must-
(a) invite representations by the parties and by any intermediary; and
(b) set ground rules for the conduct of the questioning...'

Meanwhile in the FJS

5. Having identified some of the failures in the case, I turn next, and briefly, to one of its significant redeeming features. The role of the intermediary service.

6. I wish to pay particular tribute to Clare Jones and Rebecca Fletcher from Communicourt Limited who offered an excellent intermediary service to the Court for the mother in this case. The mother has significant communication difficulties, both with understanding and using language; this is likely to be attributable in part to her learning disability, and in part to acquiring English as a second language.

7. ...Ground rules had been set by HHJ Hudson at the IRH; these were revisited at the outset of the hearing. Specific ground rules were set for the mother's evidence, which we all endeavoured conscientiously to observe.

8. Overall, I was satisfied that the mother had been enabled to participate in the process as fully and effectively as could possibly be achieved. I am indebted to the intermediary service for its assistance.'

Cobb J in *Newcastle City Council v WM & Ors* [2015] EWFC 42.

Meanwhile in the FJS cont.

- *A parent in care proceedings with mental health difficulties gave evidence in a pre-recorded examination conducted by counsel in her chambers. All advocates and the judge contributed to the planning of topics to be covered and an intermediary helped counsel plan her questions. The recording of the witness's evidence was conducted by a professional third party who signed a confidentiality agreement. Questioning, including breaks, took three and half hours and an edited DVD lasting ninety minutes was admitted as evidence in the family proceedings. (Toolkit 13)*
- *An 8 year old child who was alleged to have been sexually abused by a family friend, had already given an ABE interview to the police, and was subsequently interviewed by an expert child psychiatrist in the family proceedings. All parties contributed to the planning of the psychiatrist's interview. The interview was recorded in a vulnerable witness interview suite at a local police station and the DVD recording used as evidence in the family proceedings. An order was subsequently made for the interview to be disclosed to the police so that it could be use it as evidence in related criminal proceedings. (Toolkit 13)*

The Advocate's Gateway Conference 2015: *Addressing Vulnerability in Justice System*

- Sir James Munby: Family law lagging “woefully behind criminal law” in terms of procedures for the inclusion of children and vulnerable adults. Children currently “invisible” in family proceedings. Many public law cases parents have learning difficulties. Procedures for taking evidence from victims are inadequate for example in family cases a perpetrator might cross-examine the complainant, something which legislation prevents in the criminal court and Mr Justice Wood had drawn attention to this as long ago as 2006.
- *H v L and R* [2006] EWHC 3099 (Fam), [2007] 2 FLR 162.

Reliable research, careful analysis, sensible recommendations and collaboration

The
Advocate's
Gateway

Responding to communication needs in the justice system

[Home](#)

[Contact Us](#)

[Committee](#)

[Toolkits](#)

[Events](#)

[International](#)

[Conference 2015](#)

[Links](#)

[News](#)

[Training Film](#)

[Intermediaries](#)

[Resources](#)

[Training](#)

[Cases](#)

[Press](#)



Latest News:

**The ATC are pleased to announce the launch of three Autumn
masterclasses on the following topics:**

www.theadvocatesgateway.org/20-welcome/18-welcome

The Use of Communication Aids

Toolkits (Updated July
2015)

- > **1.** Ground rules hearings and the fair treatment of vulnerable people in court
- > Ground rules hearing checklist
- > **1a.** Case management in young and other vulnerable witness cases
- > **1b.** Case management in young and other vulnerable witness cases - summary
- > **2a.** General principles from research: planning to question a child or adult with communication needs
- > **2b.** General principles from research: planning to question a child or adult with communication needs - summary

The Advocate's Gateway

- 2011 'Raising the Bar' ATC report recommended 'Toolkits' for questioning vulnerable witnesses and defendants
- 2012 The Advocate's Gateway 'blog' then partnering with The Advocacy Training Council
- 2013 Launch by the Attorney General including first set of toolkits
Criminal Practice Directions (2013) – recommended the toolkits
Grant funding and setting up working groups for new toolkits
- 2014 *R v Lubemba* – CACD endorsed 'TAG' toolkits
- 2015 Leveson J report of Efficiency in the CJS also commended 'TAG'

'TOOLKITS'

WITNESSES AND DEFENDANTS
WITH AUTISM: MEMORY AND
SENSORY ISSUES

VULNERABLE WITNESSES
AND PARTIES IN THE
FAMILY COURTS

INTERMEDIARIES:
STEP BY STEP

Toolkit 16
6 March 2015

Toolkit 13

VULNERABLE WITNESSES
AND PARTIES
IN THE CIVIL COURTS

Toolkit 17
July 2015

Toolkit on aids to communication and 'extra special measures'



Complexities include...

- An adversarial system – cross-examination has been advocate-driven for 100s of years
- Introducing intermediaries - for the first time a third party in the examination and cross-examination dynamic - a brand new profession – not supporters, not expert witnesses – only regulated by MOJ for witnesses in the CJS but now working in other areas of the justice system
- A justice system with no spare cash
- Judges not wishing to stray into the trial arena but...
- An increased emphasis on inclusion, adjustments and better case management

theadvocatesgateway.org

penny.cooper@39essex.com

The
Advocate's
Gateway

Responding to communication needs in the justice system

Home

Contact Us
Committee
Toolkits
Events
International
Conference 2015
Links
News
Training Film
Intermediaries
Resources
Training
Cases
Press



Latest News:

The ATC are pleased to announce the launch of three Autumn

masterclasses on the following topics:

www.theadvocatesgateway.org/20-welcome/18-welcome

The Use of Communication Aids

Toolkits (Updated July 2015)

- › 1. Ground rules hearings and the fair treatment of vulnerable people in court
- › Ground rules hearing checklist
- › 1a. Case management in young and other vulnerable witness cases
- › 1b. Case management in young and other vulnerable witness cases - summary
- › 2a. General principles from research: planning to question a child or adult with communication needs
- › 2b. General principles from research: planning to question a child or adult with communication needs - summary

39essex.com

BARRISTERS . ARBITRATORS . MEDIATORS

LONDON . MANCHESTER . SINGAPORE . KUALA LUMPUR

39 Essex
CHAMBERS

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number OC360005) with its registered office at 39 Essex Street, London WC2R 3AT. 39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 39 Essex Street, London WC2R 3AT

39essex.com

BARRISTERS . ARBITRATORS . MEDIATORS

LONDON . MANCHESTER . SINGAPORE . KUALA LUMPUR

