



crime news

OCTOBER 2009

EDITORIAL

Welcome to the October 2009 edition of the newsletter. We also continue to update our website with news and useful material – visit www.guildhallchambers.co.uk.

Following the successful 'introductory year', and recent experience, Ian Fenny helpfully explains the use of Intermediaries. Their use is likely to become more and more common place in criminal trials. As Ian demonstrates both the Prosecution and Defence may derive help in presenting their case from this special measure – it is not simply a device to bolster a Prosecution case.

Four pieces of Crime Team news:

- 1 Richard Smith QC has returned to chambers after another successful tour with the British and Irish Lions in South Africa. As part of the Management Team, acting as Team Lawyer, this was Richard's 2nd Lions' tour. Richard continues in his capacity as Team Lawyer to the England RU team.
- 2 Andrew Langdon QC took over from Richard Smith QC as the head of the Crime Team in the summer.

3 The Crime Team wish to congratulate Robert Davies on his appointment as Principal Advocate with the Organised Crime Division, CPS HQ. Based at their national South West base in Birmingham this is a significant appointment. Robert survived a demanding selection process and beat off competition from a high calibre field. This is no doubt due to his ability and dedication as demonstrated during his 19 years of successful practice at Guildhall Chambers.

4 Likewise, the Crime Team is pleased to announce that Mark Worsley, Brendon Moorhouse and Martin Lanchester were successful in the recent competition for appointment to the Attorney-General's list of Advocates. It has been reported this competition attracted a particularly high number of applicants. Such appointments allow counsel to represent Government departments in sensitive, complex and high profile cases.

James Bennett



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House of Lords



In one of the last hearings in the Chamber of the House of Lords in February and April, Peter Blair QC and Kerry Barker represented a 12 yr old appellant to argue that the ancient rule of law, *doli incapax*, had survived the Labour Government's reforms in the Crime and Disorder Act 1998, (*R v JTB* [2009] UKHL 20).

The appellant had committed very serious sexual offences against his friends in the course of a game he had invented. He had done so without any knowledge or understanding of the criminal nature of his acts as demonstrated in interviews by the police lasting over 18 hours and expert evidence.

The House of Lords found that the Court of Appeal had been wrong to deny the existence of the rule of law separate from the presumption that it applied but nevertheless, in

what was said to be a rare application of the rule in *Pepper v Hart*, held that Parliament had intended to abolish both the presumption and the ancient rule of law.

The case involved research going back to the Saxon Laws of Ine (preceding the laws of Alfred the Great) as well as the works of Blackstone and Coke.

Peter Blair QC and Kerry Barker

Intermediaries



A history

All practitioners will be aware of a range of special measures introduced by the Youth Justice & Criminal Evidence Act 1999. They were brought in to provide mechanisms by which vulnerable and disadvantaged witnesses could give 'best evidence'. The Act received the Royal Assent on July 27th 1999.

Implementation of the various measures has been piecemeal and confusing.

Provisions relating to Intermediaries have been in force since February 24th 2004. Pilot schemes were set up in six areas in 2004. By 2005-2007 cases were beginning to trickle their way through in these areas. In June 2007 the decision was made to extend the service nationwide. It followed the Home Office funded the scheme for an introductory year starting April 2008. Since April 2009, if the measure is used as part of the investigation it is funded by the police, and if the measure is used as part of a prosecution it is funded by the CPS.

What is an Intermediary?

- An individual possessed of specialist skill (applicable to the individual case) designed to aid a vulnerable witness in need of assistance with communication and understanding in giving 'best evidence'. This role involves both pre-trial and trial stages.
- The Intermediary is independent of the Crown, the Defence and the witness to be helped.

Who is the Intermediary?

- In the vast majority of cases the Intermediary will have a specialised professional background e.g. many are trained & qualified speech therapists or Teachers. It does not follow that an Intermediary has to be a trained professional.
- An Intermediary must be registered. The preconditions for registration are "competency based". Intermediaries attend specific training to build upon their established professional experience. At present there are some 130 trained Intermediaries nationwide.

Who will qualify for an Intermediary?

- All vulnerable witnesses as defined by s.16 Youth Justice & Criminal Evidence Act 1999 i.e.
 - witnesses under 17
 - those who suffer from mental disorder or significant impairment of intelligence & social functioning
 - those who have a physical disorder or condition that is likely to affect their evidence
- A defendant is expressly excluded from any special measure.

What role can the Intermediary play?

- At all stages the role of the Intermediary is subject to the express review and approval of the Court.
- The Intermediary can (and in the author's view should) be involved in the earliest stages of an investigation where it is established that assistance is required. E.g. an Intermediary may be invaluable in playing a role in the video interview of a qualifying witness.

- The Intermediary will assist the parties and the Court in determining how their respective roles can best be achieved. Thus Defence counsel can receive constructive help as to how to put their case. The Intermediary will offer all the assistance necessary to allow the vulnerable witness to give the evidence they should. Their role is not partisan; it is to help in achieving fairness and justice.

For the scheme to be effective the Intermediary must be allowed to develop a rapport with the qualifying witness.

How does it work?

- At any stage of the process it is open to the Crown to apply for an Intermediary. During the "roll out period" it is inevitable that Intermediaries will be appointed after the investigative stage has ended and at some stage during the trial process. There is nothing wrong in this. It is subject to the Courts' judgement & review. Even at the eleventh hour it can provide tremendous help to all.
- In the perfect world the need will be identified during the early stages of the investigation.
- Once an Intermediary is identified and appointed he/she will meet the witness and produce a report. The contents of that report are served upon all parties. The report is an evaluation of the abilities and needs of the witness. It follows that the assessment is for the assistance of all parties.
- A special measures application must be made.
- Once the measure has been granted (it is suggested) there ought to be a dedicated PTR at which all issues arising from the application can and should be considered. The Intermediary should attend with trial counsel and the appointed trial judge.
- At trial the Intermediary will be present with the witness. A specific oath is administered.

Does it work? (a personal view):

No one has extensive knowledge of the scheme as it is very new. From my own experience from both the pilot schemes and post April 1st 2008 the answer is a resounding yes!

- The reality is that it enables witnesses who would be (otherwise) disenfranchised to give evidence.
- It improves confidence in the whole process. All parties can be clear about what the witness really has to say. The witness derives security from the knowledge he/she can communicate. Vulnerability and disability cannot be exploited as against the witness.
- The Defence may derive significant help in the manner in which they prepare and present their case. It would be a great mistake to conclude that this special measure is simply a device to bolster a Prosecution case.
- Early experience with the Intermediaries suggests that they are well qualified, highly competent and enthusiastic. It remains to be seen whether this will be maintained.

Above all it promotes a fair trial.

Ian Fenny

Useful links can be found at www.lcjb.cjsonline.gov.uk