Ch 5: Witnesses

Oaths and affirmations

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Concerning telephone hearings necessitated by the Covid-19 outbreak, the witness will take the oath or affirm before beginning to give evidence, but there is no need to use a holy book or scripture unless the witness wishes to, in which case the witness should have this to hand: see HM Courts and Tribunals Guidance, 'What to expect when joining a telephone or video hearing', 25th March 2020, accessible at https://www.gov.uk/guidance/what-to-expect-when-joining-a-telephone-or-video-hearing .

Witnesses in civil cases

The witnesses to be called

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Dealing with cases justly includes ensuring that the parties can participate fully and that witnesses can give their best evidence: see The Civil Procedure (Amendment) Rules 2020 (vulnerable witnesses) SI 2020/117, R 4. See also the Civil Practice Directions, PD 1A, Participation of Vulnerable Parties or Witnesses (supplementing the CPR, Pt 1).

Witness statements

In *Morley v Royal Bank of Scotland plc* [2019] EWHC 2865 (Ch), it was held that where a party seeks to rely on a summary of a witness statement under R 32.9(1), it is normally expected that the party will have asked the witness whether she or he is prepared to provide a statement. In this respect, the requirement under R 32.9(1)(b), that the party should show that he is 'unable to obtain a statement' should be applied with 'a degree of rigour' (see *Scarlet v Grace* [2014] EWHC 2307 (QB) at [10], cited in *Morley v Royal Bank of Scotland plc* [2019] EWHC 2865 (Ch) at [99].

However, it the court also stated that it was necessary to be realistic, too. On the plain wording of R 32.9(1)(b) and applying ordinary principles of causation, a party may be 'unable to obtain a statement' where the court is satisfied on the balance of probabilities that had a request been made to the witness, it would have been refused. In *Morley v Royal Bank of Scotland plc*, the claimant's witness summaries were served very late, but, in the round, the fairness of the trial would not have been disrupted by granting the claimant permission to

rely on them. The summaries were compact and the respondent was not being ambushed or otherwise prevented from preparing for the trial properly.

Concerning the meaning and effect of the phrase in the rule, 'unable to obtain a statement', see *Otuo v The Watch Tower Bible and Tract Society of Britain* [2019] EWHC 346 (QB) at [20] – [23].

Special measures directions for vulnerable and intimidated witnesses

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It is submitted that there is a further failing in respect of the provisions. The failing is an arbitrary distinction, in the case of the presumptions in favour of special measure directions between (a) child witnesses and complainants in respect of sexual offences and (b) other types of vulnerable witness, for example, older victims of crime. See, in this respect, Brown and Gordon, 'Exploring and Overcoming Barriers to Justice for Older Victims of Crime' [2020] Crim LR 1127 at 1134-5.

As noted in the text, another failing is that the statutory scheme does not apply to civil proceedings. However, the civil courts must ensure that parties can participate fully and that witnesses can give their best evidence. See The Civil Procedure (Amendment) Rules 2020 (vulnerable witnesses) SI 2020/117, R 4. In family proceedings special measures are available under the Family Procedure (Amendment No 3) Rules 2017, SI 2017/1033, Part 3A 1-2: the court has a duty to consider the vulnerability of a witness and to provide assistance to protected witnesses by making 'participation directions' for measures such as intermediaries or live links, to help the witnesses participate and give evidence. The rules are supplemented by a Practice Direction which provides for the holding of a Ground Rules Hearing: PD 5.2–5.7. See also Gold, 'Civil Way, Procedure & Practice, Family Catch-up', [2017] NLJ, 24 November, 13.

The accused

Examination through an intermediary

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Where an intermediary is not available, a Ground Rules Hearing should take place to determine the accused's disadvantages and how they might be addressed: *R v Pringle*

[2019] EWCA Crim 1722 at [103]. As to the responsibilities of advocates, see *R v Thomas* [2020] EWCA Crim 117 at [42] – [43], approving what was said in *R v Rashid* [2017] 1 WLR 2449 at [80].

In *R v Thomas* [2020] EWCA Crim 117 the Court of Appeal reviewed the Practice Direction and relevant authorities and laid down core principles which may be summarised as follows:

1. The experience of the courts as reflected in the Practice Direction is that at one end of the spectrum will be cases where an intermediary is required for the entire trial and at the other end, despite the accused's difficulties, a fair trial can be achieved without appointing an intermediary. There may be variations between these extremes, so that an intermediary may only be necessary for parts of the trial, for example, when the accused gives evidence (at [34]).
2. There have been very significant improvements in recent years to ensure that vulnerable accused can participate effectively in their trial, including the use of intermediaries (at [35]).
3. As stated in the Practice Direction, the appointment of an intermediary for the accused's evidence will be rare, and exceptionally rare for the entire trial. This is an important reminder to judges that intermediaries should not be appointed on a 'just in case' basis or because the report of an intermediary or psychologist has not provided the judge with a proper analysis of a vulnerable accused's needs in the circumstances of the forthcoming trial. The assessment will be fact sensitive, calling only for an assessment of the accused's difficulties in the context of the actual proceedings the accused faces (at [36]).
4. The infinite variability of criminal cases means that intermediaries should not be appointed as a matter of routine trial management. There must be compelling reasons, it being clear that all other adaptions to the trial process will not be sufficient to meet the accused's needs to participate effectively in the trial. However, although the most careful scrutiny of applications is required, the judge cannot derogate from the need to appoint an intermediary 'when necessary', as indicated by the Lord Chief Justice in *R v Grant-Murray* (at [37]).
5. Applications need to be addressed with care, sensitivity and caution to ensure the accused's effective participation by whatever adaption to the trial process is required. The recommendation by one or more experts is not determinative, this being a question to be resolved by the judge, who is best placed to assess what is required to ensure the accused receives a fair trial (at [38]).

These principles were repeated and adopted by the Divisional Court in *R (TI) v Bromley Youth Court* [2020] 2 Cr. App. R. 432 (22), QB at [21]. In *R (TI) v Bromley Youth Court*, an intermediary had been strongly recommended for the whole of the trial by both an intermediary and a psychologist who had assessed the difficulties faced by the accused. It was held that the district judge, on the facts of the case and considering the reasons that she had given, had been wrong to refuse to appoint an intermediary. In respect of the reasons given by the district judge, the court held that: while the youth court may be well used to dealing with young vulnerable accused, this does not meant that it cannot be assisted by experts as to the needs of an individual accused if required- as was stated in *R v Thomas*, the circumstances of the individual must be assessed (at [38]); while an account given by an accused in interview might be strong evidence of the accused's ability to engage with proceedings, a prepared statement read by the accused's solicitor (which is what happened) does not by itself demonstrate this (at [41]); while the concept of 'lawyers only' cases can be recognised (the case is reduced to agreed facts or admissions, the only issue will be an inference drawn from the facts, and the accused's participation will be limited), the present case involved disputed evidence and the possibility of unexpected developments in the prosecution case (at 42]); and in the recognised 'lawyers only' cases, a judge may well be entitled to consider it unnecessary to appoint an intermediary at any stage of proceedings *prior* to the accused giving evidence (*Ibid*).