

EFFECTIVE ADVOCACY—SECOND LECTURE

*Janice Brennan**

I. BENEFITS OF PRE-TRIAL CONFERENCES

Alas we are often constrained by a lack of time and a lack of financial resources. Nevertheless, if at all possible, whether you prosecute or defend, hold a pre-trial conference. Inevitably questions will come to mind as you read the statements of the potential witnesses or read the response of the Defendant. To perform well at trial you need to have as many of those questions answered as you can achieve, because those answers may well change your case strategy.

Police officers are very good investigators of crime, but they are not lawyers and not advocates. An early case conference can help them by pointing them in the right direction to fill a gap in the evidence, for example, you might need a further statement from the victim. If the interviews with the Defendant are not yet concluded, a case conference can guide the police as to a particular line of questioning for the suspect.

When defending, an early pre-trial conference enables you to advise the client of his/her prospects of success if pleading not guilty, what further evidence should be obtained to assist the Defendant, for example, medical evidence to establish the likely causation of certain injuries, psychiatric evidence to show a mental disorder, evidence of alibi and so on.

Early preparation and advice saves time and saves money. It is in no-one's interest to have a trial adjourned or delayed because something that could have been done in advance has not been done. It is unfair to the witnesses and unfair to the Defendant, especially if the Defendant is in prison pending trial.

I am an absolute supporter of effective teamwork. When I prosecute I consider myself to be part of a team together with the police officer in charge of this particular investigation and with the Crown Prosecution Service. When I defend, I am part of a team together with my Instructing Solicitor and my client. No single one of us has a monopoly on wisdom. Whilst ultimately at the trial I have sole control of the conduct of the case, nevertheless each of us may contribute a helpful idea or suggestion.

II. THE IMPORTANCE OF PROPER DISCLOSURE

Of course we all like to win our cases, but there is no real satisfaction to be gained if you have to cheat to gain that success. To cheat is also to risk a gross injustice and nobody benefits at all if an innocent or possibly innocent person is convicted. The State wields enormous power over its citizens. Without democracy and the Rule of Law, there can be no justice. In England, nobody is above the law, nobody. The Judiciary is wholly independent of the Government. We call it The Separation of Powers. The Government can be sued in the civil courts and prosecuted in the criminal courts when it has done wrong.

The right to a fair trial is a fundamental principle of English law. We did not always have this right, but we have learned lessons from our mistakes centuries ago. As part of Europe we also have rights under the European Convention on Human Rights. Few rights can be more important than the right to a fair trial.

*Barrister, Barristers' Chambers, United Kingdom.

Full and proper disclosure must be made of all material in the possession of the Prosecution which may assist a Defendant in the presentation of his/her defence at trial. For example, a Defendant may be charged with a serious assault. At interview he says: "It was not me, I was not there." The police have a statement taken from a passer-by who saw the assault. That witness says that the attacker was 6 feet tall, aged about 25 and completely bald. The Defendant is aged 36, 5 foot 2 inches tall and with long hair. To withhold that statement from the Defence and, therefore, from the Court is simply wrong. It is unfair, it is cheating. It risks the conviction of an innocent man.

That is, of course, an obvious example of material that must be disclosed to the Defence. Most cases are not so straightforward. Since 1996 Defendants in England have been required by law to set out in a document given to the Prosecution and to the Court the essence of the defence case. It is designed to identify in advance of the trial what the real issue in the case is. For example, on a charge of rape, the Defendant may say: "I did not have sexual intercourse with this woman at all." Or he may say: "We did have sexual intercourse, but she consented throughout and I had no reasonable grounds for believing that she did not consent."

This document helps the Prosecution to identify what material it possesses that ought to be disclosed to the Defence. The test applied is as follows: all material in the Prosecution's possession, which is capable of undermining the Prosecution's case or which is capable of assisting the Defendant in his defence, must be disclosed. I will not pretend that prosecutors in England have always got it right. There have been some disgraceful cases where the Court of Appeal years later has quashed convictions because material which ought to have been disclosed was wrongfully withheld either deliberately or negligently. Some Defendants have spent many, many years in prison for crimes they did not commit because of errors in disclosure by the Police or the Crown Prosecution Service or the Prosecuting Advocate. We must never fail to take our duty to make proper disclosure seriously. It is no excuse to say that we believed that the Defendant was guilty and we simply wanted to make sure that he/she did not get away with the crime. We are not the Judge or the Jury. If a Defendant is guilty, then let us prove it by admissible evidence, without cheating. Only then do we earn the conviction. I want to sleep soundly each night in the knowledge that I have behaved correctly.

III. VULNERABLE DEFENDANTS — THE DECISION TO PROSECUTE

Not every person who commits a crime has to be prosecuted at Court. Some crimes are simply too trivial; other times a Defendant may be too vulnerable for it to be in the public interest to prosecute. Age, health and especially mental health are all factors that fall to be considered when deciding whether to prosecute at all.

English law has not always been a matter for pride. In the 18th and 19th centuries, tiny children faced the full weight of the criminal law merely because they stole a bit of food to eat. They were imprisoned for years with adult prisoners in dreadful, inhumane conditions. We treated the mentally ill in the most despicable way. We were shameful. Those dark days, thank goodness, are now well behind us.

If a child is arrested, a parent or guardian or other suitable adult has to be informed and that person accompanies the child when interviewed at the police station, in addition to any lawyer. If the crime is not serious and the child admits the commission of the crime, then instead of going to Court, the child receives what is called a police Caution. It is a formal reprimand by a senior police officer and is designed to show the child the seriousness of the matter and to encourage good behaviour in the future. We all know that children can make mistakes and this course is intended to keep the child if at all possible out of the criminal justice system. If the crime is serious or if the child does not admit the commission of the crime, then any trial and punishment is dealt with in specially designed Youth Courts.

If a crime is serious, but the Defendant has severe mental illness so as to be unfit for trial, then there are benign ways of dealing with those cases too. We are, in short, much more civilised in our approach now.

IV. VULNERABLE WITNESSES

I suspect that you are more interested to hear how we in England deal with vulnerable witnesses. Again we have learned from the mistakes we made in earlier years. In the old days, and by that I mean as recent as the 1980's, we paid very little attention, if any, to the needs of witnesses. They were simply there at Court when the trial started, we called them into the witness box to give their evidence and then they went home. They were no more than a commodity for us. We did not think about their needs, their concerns, their welfare, the effect on them of giving evidence — we did not think about them at all.

Sometimes they would sit in the corridor outside the Courtroom for days and days until we wanted them to go into the witness box. When they finished their evidence they were dismissed without so much as a thank you or a goodbye. Child witnesses were treated no differently to adult witnesses. The physically or mentally disabled were also treated no differently.

I have vivid memories of the time when I started my career in 1980. A rape victim would have to sit in the corridor outside the Courtroom, sometimes within feet of the very Defendant she said had raped her, while we all waited for the trial to start. Or a child witness would have to balance on top of two or three cushions in order to see and be seen from the witness box and would then be so overawed by the sight of so many strangers, adults, some in weird legal wigs and robes, that the child would be unable to give evidence or even speak at all because of complete and utter fear. Or a case where the Defendant would not be prosecuted purely because the victim had a learning disability or mental illness and was, therefore, presumed not to be capable of telling the truth or giving reliable evidence.

I am delighted to tell you that we are much more civilised, sensible and considerate these days. We now have in every criminal court what we call the Witness Service. It is staffed mainly by volunteers, young and old. The Witness Service is provided with the details of all witnesses for the prosecution. If the Defence request it, they will also look after defence witnesses, but I will focus my address to you on prosecution witnesses.

The Witness Service arranges a pre-trial visit to Court for all witnesses in order to familiarise them with the process of a trial. The witness will be shown a courtroom, told who sits where, what their functions are and so on. It is designed to make the witness feel more at ease. What the Witness Service does not do, and must not do, is discuss the evidence with the witness. The Witness Service staff have to remain entirely neutral and impartial. They provide a private room where the witnesses can wait, often with a cup of tea or coffee, until required to give evidence in the Courtroom.

Those of us who appear in Court every working day can easily forget just how daunting an experience giving evidence can be. Many people in their normal day to day lives will never have to speak in public, watched by strangers. If the witness is the victim of a particularly dreadful crime, for example, rape, they are often terrified of the Defendant and cannot bear to see him. In such circumstances it can be very much harder to give evidence.

As a result, the law in England since 1999 now permits the use of what we call "Special Measures". These are measures designed to make it easier for witnesses to give evidence and, consequently, to improve the quality of their evidence.

V. SPECIAL MEASURES

My preferred Special Measure, and the most common one for adult witnesses, is the use of a screen by the witness box which shields the witness from both the Defendant and the public gallery. The witness remains in the sight of the Judge, the Jury and the Advocates. The Defendant and anyone in the public gallery can hear, but not see the witness.

Another Special Measure is where the witness does not enter the Courtroom, but instead gives evidence from another room, either in the same building or elsewhere, over a television or video link.

The witness can see only the advocates and the Judge, whichever is speaking at that point to the witness. Everyone in the Courtroom on the other hand can both see and hear the witness.

Child witnesses receive particular assistance from the outset. First of all, instead of making a written witness statement to the police as adult witnesses do, children are questioned by specially trained interviewers and that conversation is recorded on a DVD. There are very strict rules on how to question a child because children are very susceptible to suggestion. Instead the child is encouraged simply to tell the interviewer all that the child can remember. The questioner will probe a little but must be extremely careful not to put words or ideas into the head of the child. The DVD recording becomes the initial evidence of the child at the trial.

One of the most important advantages of recording the evidence of a child in this way is that it captures the child's evidence at a time when a child's ability to remember an event is at its best, because a child's memory fades very much more quickly than that of an adult. If I witness a crime in 2014 and I give evidence about that crime at a trial in 2015, that gap of one year is a mere 1/56th of my life. Now consider a child who is aged five and is questioned a week after the incident. That child's recollection is likely to be very good. But if the trial does not take place until the child is aged 6, that delay of one year is a substantial 1/6th of the child's entire life.

The advantages of this method of recording evidence are obvious, but there are disadvantages too. The most important is that in my experience juries become much more engaged with a witness when that witness is actually present, flesh and blood, in the witness box in the Courtroom. Sometimes I fear that when they watch a DVD recording of a witness, juries forget that it is a real person because it is like watching a programme on television or in the cinema.

Sometimes the questioning by the interviewer is not good or the child witness gives a confused or difficult to follow account. There have been occasions, admittedly not frequent, where I have abandoned the DVD recording because it had little value and instead I have called the witness in the traditional manner.

The problem which we face in England at the moment is what to do about cross-examination of a child witness. At present that is still done at the trial, but instead of the child sitting in the witness box, the child is in a separate room in the Court building, together with a member of the Court staff, and the child is spoken to over the television link. The advantage of this procedure is that the child is not overawed by the sight of strangers in a large Courtroom or frightened by the sight of the Defendant or intimidated by people in the public gallery. But the problem of delay remains and quite often the child has little recollection of the event because of the lapse of time.

Initially it was thought that the problem could be overcome by pre-recording the cross-examination too. Superficially that sounded like a perfect solution, but it is not. When I defend I am only able to finalise my case strategy for the trial once I have received all of the evidence from the Prosecution and all of the other material that falls to be disclosed. Then, and only then, am I able to work out how best to cross-examine each witness. So if my cross-examination of a child witness is to be pre-recorded, when can that be done? What if after I have done that cross-examination, some other material comes to light that calls for further cross-examination? How do I know perhaps months in advance that I will be the person who actually conducts the trial? As you can see the matter is far from straightforward. I very much welcome your thoughts and ideas on the best way to deal with such a problem.

The use of what we call "intermediaries" is another special measure available to us. An intermediary is a specially trained person, often a psychologist or similar professional, who can assist with communication with a witness who has a learning disability or a mental health problem. The intermediary meets the witness in advance, determines what the precise needs of the witness are and then advises the Judge on how best to handle the witness. The intermediary will sit in the witness box with the witness and intervene where necessary.

For example, a witness may be severely autistic. As you will know, those with autism often interpret language absolutely literally. In England when it rains, as it often does, very heavily, we may say that

it is “raining cats and dogs.” A person with autism, who hears that phrase, will look up to the sky and expect to see cats and dogs falling down from the sky with the rain. So the intermediary will advise the Judge that, when the witness is questioned, the advocates must use simple, direct language.

VI. THE TIMING AND DURATION OF EVIDENCE

Those who prosecute, but also to a lesser degree, those who defend, need to plan well before the start of the trial which witnesses to call, in which order, on which day and when. We simply cannot expect witnesses to put their normal lives on hold only to sit for hours, or worse, days in a waiting room at Court. It is unkind and it is unnecessary. We need to decide as part of our case strategy the order in which we want to present our evidence to the Jury so as to maximise its effect. We need to assess roughly how long each witness will take to give the evidence and be cross-examined. Of course we may be wrong in our estimate. A witness may suddenly cry and need to have a break or the cross-examination may last much longer than I anticipated, but I can at least make an attempt to gauge when I shall require my next witness. That way, if there is a delay, the witness who is kept waiting can understand what the cause of the problem is and can appreciate the fact that we have tried not to inconvenience him/her any more than was absolutely necessary.

It may be that a particular child witness or adult with a learning disability has a very short attention span and will need a break after every 15 minutes of questioning. Young witnesses usually perform better in the morning when they are at their freshest. These are all factors to consider when you plan how to conduct your case.

One problem which we have yet to solve in England is what to do with a vulnerable witness in a trial with many defendants. Usually each defendant has a separate advocate entitled to cross-examine each witness. But if the witness is, for example, a young child, should there be a limit on the nature and duration of the cross-examination? Thus far, English Judges have been reluctant to intervene unless the questioning was wholly improper, but as a consequence we have had some disgraceful trials where a child victim of sexual trafficking by gangs of men has had to endure many, many days of hostile, aggressive cross-examination by 10 or more defence advocates until the child is reduced to tears. Of course each defendant has an absolute right to a fair trial, which includes the right to test and probe the evidence of any witness, but do the witnesses not have rights too? In fact my view is that an aggressive cross-examination of a child is not good or effective advocacy at all and is merely likely to engender sympathy from the Jury for the witness and hostility against the Defendant; in other words, it is counterproductive.

Some people have suggested that, in such cases, the Judge should conduct the cross-examination instead, but how can that work? The Judge has to remain impartial between the prosecution and the defence. The Judge does not get to talk privately with the Defendant to obtain his/her account of the incident. How can the Judge avoid appearing to express an opinion as to the credibility of the witness?

VII. ADVOCACY TECHNIQUES WITH VULNERABLE WITNESSES

Advocacy is never easy, but it is, as you will all know, very much harder with children and with those with mental health problems or learning difficulties. Then more than ever it is necessary to consider in advance your strategy. Short, clear questions are essential. Simple language has to be used. Your pace has to be measured, not only in the speed at which you speak, but also in allowing the witness as much time as he/she needs to answer. Ask only what you absolutely have to and not a single question more. And don't forget to smile. A scared witness is unlikely to be a useful one.

English advocates wear wigs, gowns and bands in Court. To me it is simply my normal uniform and I am barely conscious of it any more. But to a vulnerable witness it can be a distraction or make me look frightening. You may wish to ask the Judge temporarily to dispense with such clothes.

If you want the witness to look at a plan or a map or other document, is it in a form that a child witness can understand? You might need to have available a much simpler version. Never mock a vulnerable witness for not understanding something as not only is that extremely rude, but it will also

turn the Jury against you and is, therefore, completely unproductive. Try not to call a young witness a liar as this can upset a child deeply. Far better to suggest that they are wrong or mistaken. The Jury will not only understand, but will also like you for your decency and thoughtfulness.

Sometimes it is necessary to create a novel way to help a particular witness overcome a personal difficulty in giving evidence. I was once asked to prosecute a rape case where the victim had come to England for an arranged marriage only to discover that her husband was abusive and violent to her. She had come from a very small village in Pakistan and spoke little English. When her husband began to threaten to harm their young baby if she resisted his demands for ever more violent sex, she found the courage to call the police. The problem was that for cultural reasons she was unable to talk about any intimate matter such as sex to any male or even in front of any male. Alas not only was the Judge male, but so too was the Defence advocate and because jurors are selected at random in England, it was inevitable that some of the Jury would also be male. She refused to give evidence. I had to find a solution.

The solution was first of all to put this particularly vulnerable victim in another room at the Court which had a camera fixed on her and a television screen for her to look at. She would give her evidence from that room in her own language. We in the Courtroom could both see and hear her. She, however, could neither see nor hear any of us. A female interpreter stood in the witness box in the Courtroom with a camera fixed on her. The victim on her television screen could only see and hear that female interpreter. The sound in the victim's room was switched off whenever anyone other than the interpreter was speaking. In that way the victim neither saw nor heard any male and although in her heart she knew that some men were in the Courtroom, she was able to block that thought from her mind because she could not see or hear them and accordingly she was able to give her evidence. Justice was done. It just required some extra thought and preparation by those of us on the prosecution team.

VIII. VULNERABLE DEFENDANTS

The vast majority of Defendants in England are adults and many of those are repeat offenders who are well able to handle the stresses and strains of a trial. Some have almost as much experience of the Courts as I do! In recent years we have had to learn to show more compassion for those Defendants who are young or who have a mental health problem or learning disability.

Just like young witnesses, defendants who are still children have a short attention span. It is simply not sensible or fair, therefore, to sit the usual long Court hours. When children get bored, they cannot sit still, their attention wanders, they start to play with anything they can find and they begin to misbehave. Child defendants are no different. We have had to adapt our court procedure accordingly. We may take a break after only half an hour of evidence or speeches. We may work only in the morning. We do not wear our wigs and gowns. We may require any police officer in the courtroom not to wear uniform if it is likely to frighten the child. All language must of course be kept simple. It is all common sense.

IX. CONCLUSION

It is not just we advocates who need to think about these matters. English Judges have far greater powers of case management than ever before and can make orders about the treatment of individual witnesses, when the Court will sit, how often breaks will be taken, how questions are worded and so on. There has not been and there must never be any reduction in the right of a Defendant to a fair trial. Justice requires that only the guilty are convicted of the crimes they have committed. The innocent must be protected. But all that can be achieved without any injustice or unfairness to the witnesses. English law and procedure are not perfect, far from it, but we are taking steps in the right direction. We can all learn from each other's experiences and ideas. Please share yours with us so that together we can build an improved criminal justice system suitable for the next century.