

THE LIGHT-BULB MOMENT



Joyce Plotnikoff and Richard Woolfson explain why they came to believe in the need for a website that offers guidance on questioning vulnerable people.



WHEN DEALING WITH a vulnerable person appearing before a tribunal in any capacity, the judiciary has a responsibility to ensure that communication is developmentally appropriate. Procedural rules give tribunals unrestricted power to direct the manner in which evidence is to be provided and allow the tribunal to regulate its own procedure. Often the main questioning is conducted by the judge and members, so responsibilities about clarity of communication extend to the content and style of questions asked from the Bench.

Not so simple

Even experienced advocates may be unaware of the extent to which their communication may need to be adapted. In his chambers newsletter, a barrister recently complained that the trial judge had not allowed him to ask ‘even the simplest question’ of a very young complainant: ‘*X didn’t cause your injuries, did he?*’ The Court of Appeal had rejected his argument that this restriction on cross-examination was wrong. In fact, the question counsel wished to pose is not simple: a child is unlikely to understand the words ‘*cause*’ and ‘*injuries*’; the negative makes the statement harder to decipher; and the form of the question, with a ‘tag’ ending, is complex and powerfully persuasive. The Judicial College’s 2012 guidance *Fairness in Courts and Tribunals* notes that tag questions take at least seven stages of reasoning to answer and suggests that they be avoided with children. Tag questions may also lead a vulnerable adult witness to give an inaccurate response.

Reading the advocate’s complaint was a ‘light-bulb moment’ for us: was it possible to develop a resource to assist in the drafting of simple, developmentally appropriate

questions – in relation to adults with communication needs, as well as children? This aspect of case preparation is surprisingly complex and cannot be done effectively at the last minute in court.

Together with Professor Penny Cooper, and with the support of the Nuffield Foundation and City University, we developed a prototype website, *The Advocate’s Gateway*, to provide evidence-based guidance on responding to communication needs. Penny, now at Kingston University Law School, chairs the Gateway’s inter-agency

management committee which includes a tribunal judge.¹ The new website (www.theadvocatesgateway.org) was launched by the Attorney-General on 26 April and is hosted by the Advocacy Training Council. The advice is, of necessity, general. It remains advisable to obtain information about the communication abilities of the individual concerned, where possible through assessment by an intermediary (see below).

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Free information

The Gateway contains a range of free information, including toolkits covering autism spectrum disorder (including Asperger syndrome); learning disability; ‘hidden’ disabilities (specific language impairment, dyslexia, dyspraxia, dyscalculia and attention deficit disorder); children or young people; and children under seven, or functioning at a very young age. These draw on current research and the expertise of registered intermediaries, with illustrations of good and poor practice. The toolkits describe potential areas of difficulty at court for each type of communication problem. Thus, someone with an autism spectrum disorder is likely to: be prone to heightened anxiety and

sensory sensitivities; show rigid behaviour with a pressing need for ‘sameness’ and predictability; have a limited attention span; experience delay between hearing something, understanding it and working out how to respond; lack the ability to imagine, interpret or predict others’ thoughts, feelings or behaviour; be unable to sustain eye contact; and fail to recognise that they do not understand something said to them.

Framing questions

Each of these toolkits provides advice on ‘framing your questions’, highlighting those likely to produce unreliable answers. Transcript examples are used to illustrate problematic question types (e.g. ‘*You can’t be certain that you think that it was not possible that you filled in the first side of the form?*’

asked of a defendant with learning disabilities). Where possible, the guidance suggests how a question could be improved. One toolkit brings together ‘General principles from research’ when planning to question a child or adult with communication needs. Additional toolkits address case management in young and other vulnerable witness cases; ground rules hearings (to discuss how questioning should be adapted); and effective participation of young defendants. Further toolkits are planned, including one on mental illness.

Recent Court of Appeal (Criminal Division) decisions (beginning with *R v Barker* in 2010 and including the chambers newsletter case) emphasise the role of the judiciary to ensure that questioning of vulnerable people is developmentally appropriate. The judgments (to be found in the ground rules toolkit) explore limitations on questioning and the circumstances in which the Bench may decide that an advocate should not ‘put his case’ to the witness and should instead use alternative methods to explain challenges to the witness’s evidence. These departures from

conventional cross-examination are the subject of a modular 30-minute training film, ‘A Question of Practice’, a joint project of the Criminal Bar Association, CPS, Advocacy Training Council and the NSPCC and introduced by the Lord Chief Justice. ‘A Question of Practice’ was launched jointly with the Gateway on 26 April. Links to the film can be found on the Criminal Bar Association, Gateway and Advocacy Training Council websites.

Intermediaries

Tribunal responsibilities include ‘ensuring, so far as practicable, that the parties are able to participate fully in the proceedings’. The use of ‘registered intermediaries’ (communication specialists who are mostly speech and language therapists) is confined to witnesses in criminal proceedings. However, in recent years judges have used their inherent discretion to appoint a non-registered intermediary for defendants² and, in 2012, an intermediary was appointed to assist a patient appearing before a Mental Health Tribunal. The intermediary assessed the person’s communication needs, facilitated the taking of

instructions by his solicitor and produced a report with recommendations for discussion with the tribunal (in the absence of the patient) before the start of the hearing. She enabled the patient to say what he wanted to happen, tried to ensure that, despite complex medical and legal language, he understood what was going on and alerted the tribunal when he needed a break. Her fee was paid by HM Courts and Tribunals Service.

Joyce Plotnikoff and Richard Woolfson are founders of legal consultancy Lexicon Ltd.

¹ Leslie Cuthbert, Treasurer, Solicitors Association of Higher Court Advocates.

² For information about the appointment of non-registered intermediaries, see www.theadvocatesgateway.org/images/toolkits/YoungDefendants040413.pdf.