Entry Six

For this diary entry I will focus on two features: s.28 cross examinations of vulnerable witnesses and the power of the court to issue a witness summons.

A feature of the past couple of a weeks was observing Amanda Johnson acting as defence counsel in a rape trial at Preston Crown Court. The prosecution were represented by Fiona McNeill, a member of chambers in Liverpool - a good opportunity to meet other members of Exchange from across the North West.

Common features of acting as defence counsel presented themselves, but one feature that was new to me was the inclusion of what are commonly known as 'section 28' interviews.

More on the case shortly, but should you be unfamiliar with the term, a 'section 28' refers to a special measures direction under s.28 of the Youth Justice and Criminal Evidence Act 1999. This allows cross-examination of certain witnesses to be pre-recorded in advance of the trial. A child or a person with a mental disorder as defined by the Mental Health Act 1983 are two examples of such witnesses.

Section 28 cross-examinations take a lot of case management. The issues must be highlighted in earlier hearings for judicial consideration. Questions must be reduced to writing and submitted to the Judge and the opposition for review. The questions may be edited, and have the input of an intermediary if one is being used, to hone a suitable line of questioning for the witness. All the while, the advocate must still have the defendant's case in mind, how to put their case, and how best to navigate these competing factors to reach a suitable compromise.

I had heard a lot of discussion about "s.28s" in the robing room (a hive mind of information, opinion and guidance) so when an earlier trial I was observing had to be adjourned, I saw a s.28 listed on the court schedule and decided to see what it was like in person...

My sympathies were first with the court clerk, surrounded in her seat by devices, donned with headphones and a stern facial expression. The whole of the cross-examination is recorded and therefore anyone in the room must be especially quiet. Fidgeting, whispering and audible typing on a keyboard should be avoided at all costs!

The advocates and Judge did not wear their wigs and used first names in the recording. The questions were noticeably short, measured and kept concisely to one point at a time. Taken together this gave a different feel to cross examination. As an observer, the rigid structure provided clarity to the witness but such restraints can fundamentally change the narrative features of a cross examination. Perhaps this highlights the importance of adaptability when performing duties as an advocate and the aim of ensuring a witness can give their best evidence in their circumstances, even if this clips the wings of the advocate to a certain degree.

Having described the recording of a s.28, I will return back to the trial in Preston, where the s.28s were being played to the jury. In this case, the two complainants also had given ABE (achieving

best evidence) interviews as well as s.28s, therefore the whole of their evidence was pre-recorded. As a side, this needed careful handling by the trial judge to give proper directions to the jury on why the evidence was being given in this way.

For further information on s.28s, CrimPD 6.3 and Blackstone's D14.52 - D14.55 provide useful information on procedure.

Once the recorded evidence was over, the trial progressed to live witnesses and with that came a noticeable change to the atmosphere of the room. The first live witness gave evidence from behind a screen, again, a common measure directed by the court to allow the witness to give their best evidence. Examination in chief went without incident, cross examination commenced but couldn't be finished before the end of the court day. An adjournment over night caused a significant issue in the morning when the witness refused to return.

Normally, a witness summons would be issued, which would mandate the attendance of the witness before the court to finish their evidence. It is not quite as simple as bringing every witness back before the court however, as the Prosecution are required to carry out a risk assessment prior to the issue of any witness summons. On reflection, there are many reasons why a witness summons might not be the appropriate course of action, perhaps even a dangerous one, to pursue.

Judges and advocates working well together to problem solve is satisfying to see as an observer. Knowledge of the law and procedure will go far but the human factor can often take centre stage. What could, and can, be done procedurally and what should be done when presented with a vulnerable witness can be two separate pathways. In this case, despite the best efforts of the court working as a whole, the witness could not be compelled to return.

My thought to finish this entry is about judgement (here, with the 'e'). Many pupillage interviews will involve a question or two about exercising good judgement. Answers to these questions can be wide ranging and creative; if thought about properly I think they can allow an applicant to show an interesting side to their personality or experience. From seeing advocates navigate daily life in court, exercising sound judgement in a pressured environment is such an important part of the job, validating why these questions are so often asked! Consider whether you have been in situations requiring good judgement: would you make the same decision again? How did you justify your decision? Were there alternative solutions? Would you have the confidence to justify your decision in front of a manger, a Judge or opposition counsel? These are questions I know I shall be grappling with for a while to come.