

INCOMPETENT COMPETENCY HEARINGS

Significant changes have occurred in the way vulnerable witnesses are treated by the courts. Eleanor Laws QC considers the recent case of *R v F*: [2013] EWCA Crim 424

“Helen” is a 24 year old deaf woman who lives with her parents. She cannot speak and has a limited ability to use sign language as a result of having learning difficulties and suffering from cerebral palsy restricting the use of her right hand.

She has a limited number of friends and family and spends much of her time with her parents, either at home or in the local pub.

Her parents have not learned to sign. She must communicate with them largely by pointing or trying to speak a few key words. She has a small circle of friends and family and her limited life experience has meant that her means of communicating with those who do not know her is to point at objects, try to spell, sign or demonstrate a word, and to nod frequently (even when she does not understand).

The assault and its immediate aftermath

On 29 April 2011 Helen was sexually assaulted by her sister’s boyfriend. Immediately afterwards she demonstrated by actions what had happened to her, to her sister. The next day she communicated the assault to her support worker who knew her well and understood what she was alleging. Thereafter the police were contacted. What followed did not go well...

The interview with the police took place some time later. Notwithstanding the fact that there were sign language interpreters and an advocate present to assist with communication, her account was at times difficult to follow.

This was not the first time that the police had struggled to obtain a comprehensive account from Helen. Two years earlier she had made sexual allegations against the same man. She had been video interviewed but her communication difficulties had made it difficult for the police to understand what she was saying. They decided not to charge him.

However, the 2011 allegations were charged, the case reached the Crown Court and was listed for trial. The court then held a competency hearing at the request of the defence.

The competency hearing

Helen gave evidence at the hearing with the assistance of a Registered Intermediary. She was able to understand and answer simple questions. However, towards the end of the hearing the judge asked questions from which it became clear that the witness had difficulty dealing with concepts of time and abstract matters. Finally, the judge, in an effort to obtain an answer to the witness’s understanding of the seasons, posed questions about what a daffodil looked like. When the intermediary said that she did not think that the witness knew a daffodil as such, the judge said that she did not wish to ask any further questions.

The Judge ruled that Helen was incompetent to give evidence. So, once again, Helen’s communication difficulties had posed too much of a problem. Once again, the perpetrator was given the impression that he had escaped prosecution.

In the not too distant past, that, as they say, would have been that. However, significant changes have occurred in the way vulnerable witnesses are treated by the courts. The time was right for this ruling to be scrutinised by the Court of Appeal.

The test of competency

It is worth reminding ourselves of the test of competency, in section 53(3) of the Youth Justice and Criminal Evidence Act 1999. A witness is not competent if it appears to the court that [she] is not able to:

- “(a) understand questions put to [her] as a witness, and
- “(b) give answers to them which can be understood.”

The Criminal Practice Directions [2013] EWCA Crim 1631 issued on 3 October 2013 have consolidated much of the research



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Vulnerable witnesses

and case law. They highlight the need for courts to adopt a more flexible approach, stressing the role of the Judiciary, advocating the use of ground rules hearings, restricting the scope of cross-examination where appropriate, and the use of toolkits available through The Advocates' Gateway (www.theadvocatesgateway.org). [See *Counsel* February 2014 page 27] [CPD 3.D.6].

The Court of Appeal examined relevant documents and the transcript of Helen's competency hearing and concluded that there were strong indications that Helen did indeed satisfy the competency test, listing; (a) the ABE interview; (b) the intermediary reports; (c) the ability of both counsel at the hearing to pose questions which were understood and which received intelligible answers and (d) the fact that the judge herself recorded in her ruling that Helen could understand and answer questions posed in a simple and uncontroversial manner.

Treacy LJ commented that the difficulties of questioning vulnerable witnesses should not be underestimated. He emphasised the need for training, flexibility and sensitivity, but also time and patience. However, the Court concluded that the competency hearing had been unfair and in particular that there had been too much focus on the problems arising out of some of the questioning.

Preparation for trial

The ruling did not eradicate the problems that lay ahead. Intermediary reports made clear Helen's limited ability to place months in sequential order, estimate lengths of time, link timing to a particular event, answer questions about what she had said on a previous occasion and describe a person or place. These problems were exacerbated by Helen's tendency to nod in answer to questions, whether or not she understood.

The 2013 Criminal Practice Directions [3D-F] were invaluable during the ground rules hearing that followed. (It is important to stress that the Directions also apply to vulnerable defendants.) The attendance of the police, trial Counsel, all sign language interpreters and the Intermediary was essential in order for the judge to determine a) how Helen would give her evidence, b) how she would refresh her memory, c) how she would be cross-examined, and d) how assistance could be offered to both Helen in giving her evidence and to the defence in challenging her account.

a) How was Helen going to give her evidence?

The video interviews had not, on any view, elicited the "best evidence" that Helen could give. In her interview Helen was not facing the camera and gave a confused account as to the sequence of events. She had not even been asked to clarify whether penetration had taken place.

In addition, after the Court of Appeal ruling, we had made a decision to add the 2009 allegations to the indictment. That interview had taken place some 4 years earlier.

Helen's video interviews, however, were not abandoned. Helen's allegations could be broadly understood. The passage of time since her complaints had been too great to expect greater detail if Helen were to give evidence live.

b) How would Helen refresh her memory, in particular in relation to the 2009 incidents, and how could all parties be sure she had done so?

Helen was shown all her videos in advance of the trial. An agreed form of words was read out beforehand in order to explain the purpose of the exercise. Helen watched the videos in the company of the intermediary so that she could ask questions or pause the video if she needed to. This was all filmed. Helen was cross-examined on her first day at court.

c) How could the defence challenge Helen's account given her limitations, and how was the defence to put its case, if it involved asking questions about timing/sequence?

All parties agreed that the Judge would alert the jury at the start of the trial about the nature of Helen's difficulties.

Tag questions, questions relating to sequencing, time, and previous statements were all considered unhelpful and were not asked. Questions had to be straightforward and carefully planned in advance. As a result of Helen's limited vocabulary the intermediary had developed a unique method of communication with her.

Whilst the intermediary used what appeared to be some basic traditional signed words or letters, in the main, she appeared to be depicting a whole series of pictures and movements, which to the uninitiated, looked similar to a game of charades. This was fascinating and it soon became clear when a seemingly simple question was too complex to be translated. Helen was, in the end, able to answer simple and straightforward questions. A list of relevant issues that the defence would have explored if they could, was drafted and agreed between counsel. The Judge was then able to explain to the jury why various questions were inappropriate, outlining the complainant's difficulties in communication.

As a result of the limited nature of cross-examination, care has to be taken when drafting admissions. Prosecutors will need to ensure fairness to the defence, but also check that perceived inconsistencies are accurately recorded and not over-stated.

d) What measures could be employed to assist the complainant give evidence and the defence to challenge her account?

The complainant gave her evidence from behind a screen with the assistance of an intermediary and a sign language interpreter. Helen's signing was incredibly difficult for the sign language interpreter to interpret. The intermediary was deaf and had spent a number of hours with Helen. She had built up an effective means of communication with her. Various options as to how the evidence should be given were mooted. In the end, it was decided that the intermediary would interpret the advocates' questions to Helen, interpret her answers into standard sign language to the sign language interpreter, who would then interpret the answer to the court.

The whole process took time and was extremely tiring for Helen and the intermediary. They were given frequent breaks. Two sign language interpreters were present and were alternated every fifteen minutes.

The use of visual aids including photographs, maps and body maps proved invaluable. The Judge rejected an application for the witness to be able to use replica body parts that the enthusiastic officer had sourced. They were quite large.

Conclusion

Helen's evidence took nearly two days. Her voice was heard. The jury took nearly a week to come to a decision and to convict the defendant of one of the sexual assaults, although they could not decide upon the rest of her allegations. On 6 February this year the defendant was sentenced to

It is clear that cases involving vulnerable witnesses will require those involved, from the investigation stage through to the court proceedings, to alter their approach radically. All must ensure that they are familiar with these changes and are able to approach these cases with the necessary skills and flexibility. ●



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