

COUNSEL DRAFT

WITNESS PREPARATION - IN FROM THE COLD?

The general public will remember R v Salisbury as the case where a nurse was accused of attempting to hasten deaths of patients on her ward in order to free up beds. The trial concluded on 18th June 2004. She was convicted on two counts of attempted murder. Sentencing her, the Judge described Mrs Salisbury as “callous and unprofessional”.

The Bar will remember the case for a ruling by Mr. Justice Pitchford which, for the first time, expressed judicial approval for witness training.

The witnesses in question—all due to be called by the Crown—were staff at the Mid-Cheshire NHS Trust. They had been interviewed as part of the painstaking police enquiry. Faced with the prospect of giving evidence, the witnesses were reporting severe anxiety. A manager at their hospital felt that they might be helped by outside assistance. The Trust turned to the specialist medico-legal training consultancy, InPractice. InPractice is run by a barrister and a solicitor; it is part owned by Radcliffes Le Brasseur, a London firm that specialises in healthcare cases. A course was arranged, which included advice on giving written and oral evidence, and was open not just to the trial witnesses but to all employees of the Trust. It was run by a barrister. One of the police officers ‘expressed reservations’, however, and reported the fact of the course to the Crown Prosecution Service.

When informed of what had happened, prosecuting counsel very properly decided to disclose the fact of the course to the defence. On the first day of the trial, he provided ‘an incomplete attendance list’. The defence asked for further information. During the course of the prosecution case, they applied

- a. For a stay of the indictment on the grounds of abuse of process, alternatively,
- b. To exclude the evidence of the witnesses who had undergone the course under section 78 of PACE, on grounds that its admission would have an adverse effect on the fairness of the trial.

Neither argument succeeded.

Mr Justice Pitchford heard from Trust Managers and from the barrister who delivered the training. “[The barrister] decided to issue a warning to those attending her classes at the commencement of each day. She informed them that she was aware a number of them were witnesses in a forthcoming trial. She did not know and must not know

anything about the trial". She made it clear there was to be no coaching. There was no criticism of her delivery of the course.

Mr Justice Pitchford's said that a witness training course, "whatever its title" is a matter for disclosure to the Defence at the earliest possible stage so that any issues can be aired at a pre-trial hearing. He went on to point out that he "could not have prevented the witnesses' employers providing such training". At trial his task would be to rule whether or not the evidence should be excluded under section 78.

No doubt the CPS, the Trust, InPractice and the trainer were all relieved that Mr Justice Pitchford did not rule the evidence inadmissible. He commented "True it is that witnesses would have undergone a process of familiarisation with the pitfalls of giving evidence and were instructed how best to prepare for the ordeal. This, it seems to me, was an exercise any witnesses would be entitled to enjoy were it available."

The lesson of R v Salisbury is that counsel and solicitors should be encouraged to consider witness training where it is appropriate. At the same time, counsel must ensure that the rules are followed.

Imagine your instructing solicitor suggests a training course to prepare your witnesses. How do you guard against bad training that results in excluded evidence or worse a collapsed trial?

1. Training provider's credentials

Ascertain what quality checks exist in relation to the training materials and trainers. Ask to see a copy of the training manual. Ask "awkward" questions: Has the provider ever received judicial criticism? Have any of their trainers been disciplined by the Law Society of the Bar Council? Has evidence ever been excluded on account of training they have provided?

2. Trainer's credentials

Make sure the trainer has relevant court experience – some trainers will gladly prepare witnesses for criminal trials without ever having stepped inside a criminal court.

Don't assume that the trainer is regulated by either the Law Society or the Bar Council. Arguably witness preparation training falls outside practice as a lawyer. Ask whether the trainer is following Bar Council or of Law Society Codes of Practice.

Whether barrister or solicitor, the trainer should never be coaching: suggesting or advising the witness about what to say in evidence. Also

out of bounds is dress rehearsal cross-examination on the evidence, although mock cross-examination on a fictional matter is correct in order to give the witnesses experience in the process of being cross-examined.

3. Disclose

If you are prosecuting, disclose the fact of the training. Whether prosecution or defence, be very cautious about any prosecution witness training that was undertaken without the explicit consent of the CPS and police. Training “behind the back” of the CPS/police, inevitably arouses suspicions.

For a long time I have been an advocate of witnesses preparation that is, to quote Mr Justice Pitchford, “the process of familiarisation with the task of giving evidence coherently”.

Ultimately the whistle blowers at the hospital were brave enough to speak out against Mrs Salisbury in the first place, and the witness training course they attended helped support them in the run up to the trial.

Like it or not, witness preparation training is here to stay and done properly, serves a real and valid purpose.

Penny Cooper is a Barrister and Director of CPD at the Inns of Court School of Law, City University.

“A stitch in time”, Counsel 2003, contains practical advice for barristers on preparing witnesses and can be viewed at www.city.ac.uk/icsl/cpd.

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