JUDICIARY OF ENGLAND AND WALES

**NICHOLAS MOSS JP**
**MEMBER, CRIMINAL PROCEDURE RULE COMMITTEE**

# THE CRIMINAL PROCEDURE RULES AND WITNESS ATTENDANCE FOR MAGISTRATES' COURTS TRIALS

**SPEECH TO MAGISTRATES' ASSOCIATION COUNCIL**

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It was last July that John Thornhill (Chairman of the Magistrates' Association) very kindly agreed to my speaking to council today about a then forthcoming Criminal Procedure Rule amendment dealing with the attendance of witnesses at magistrates' courts trials.

A great deal has happened in the four short months since that conversation. Back in the summer, the Rules themselves were a relatively small blip on general bench consciousness. So I was prepared for what some may have felt was an anorak moment: a brief account of the Rules in order to explain the amendment about witness attendance. Now, happily, all that has changed. The Rules have bolted up the agenda.

This month, Sir Brian Leveson and Sir John Goldring have been speaking at numerous events to promote the Rules and a very helpful guide to applying them to case management. The guide was put together by a group led by HHJ Wide QC, who is a member of the Rule committee. I think that from the MA Suzanne Alexander was involved in the project. You should expect a copy of the guide to land on your bench any day. Indeed, Council members have been given one today.

I expect, too, that some of you have now seen the equally helpful green laminates, produced by the Rule Committee secretariat, which contain an extract of the main case management provisions. Some benches may also have had specific case management training.

The other big change is that the *forthcoming* Rule amendment has now happened. It is in force as Rule 3.8 (4) last month: **In order to prepare for the trial, the court must**

**take every reasonable step to encourage and to facilitate the attendance of witnesses when they are needed.**

All of that is a rather long scene-setter, but shorter than I had planned back in July. That is because the context for my comments about witness attendance is now well established, which means that we are all aware of the *overriding objective* - to deal with cases justly - which I'm sure you will know affectionately as Rule 1.1(1)!

My story today is a bit down the page from 1.1 (1) but still at the heart of courts' case management responsibilities. It deals with the point in the proceedings:

- ❒ *after* we have taken a *not guilty* plea.

- ❒ *after* we have got to the bottom of what the issues in dispute actually are, and

- ❒ *after* testing with the parties which witnesses are really needed; and what they will contribute to a trial that we can't have as written statements - section 9s or section 10s.

At that point we reach Rule 3.8 (4). It expresses plainly a clear duty. It says we *must* do all we can to get witnesses to turn up when they are needed. Of course, to a very great extent, the court's ability to invoke this Rule successfully depends on the actions of others. After all, witnesses are the parties' witnesses. They are not the court's witnesses.

However, all those involved in the process - the police, the CPS, HMCS, witness care teams, the witness service and, of course, us - are interdependent. So it is important that <u>we</u> play our full part. Rule 3.8 (4) is designed for that purpose.

First though, I shall explain *why* it is important. Let me give you some figures for the number of trials where progress is hampered because Crown witnesses alone don't turn up. In our jargon: a problem that causes them to be ineffective - put off for another time; or crack - the end of the road for them.

You will know, I am sure, that the form that is used for logging ineffective and cracked trials offers thirty eight potential reasons: twenty six for ineffectives and twelve for those that crack.

Between February and April this year, just under 1,200 were *ineffective* because of Crown witness non-attendance. That is called in the trade, reason N3. Just over 2,000 *cracked* because of witness absence, or because they were withdrawn. That is reason J. In round figures, that is about three thousand a quarter.

Into that, you can add a proportion of the trials that were ineffective because of overlisting: insufficient court time. In the same period there were thirteen hundred of those. That is reason W3. Now, we cannot say that there is a complete correlation between overlisting and witnesses not turning up.

But common sense and our experience tell us that at least some of those put off through overlisting to a later date failed ever to take place. That is because witnesses will have lost heart and will have failed to come back to court the next time. Thereby, adding to the cracked tally.

As we know, overlisting itself is a result of cracked and ineffective trials. The more trials that do not proceed as planned, the more the courts need to overlist to anticipate - and thereby try to avoid - wasting valuable court time. It is a vicious circle.

In short, from the N3 and the J figures that we have we know that the progress of three thousand trials a quarter - *or around 1,000 trials a month* - is frustrated, principally because Crown witnesses do not appear. Bear in mind, too, that those are <u>trial</u> numbers. They're not <u>witness</u> numbers.

If you reckon an average of at least two witnesses per case, the numbers of people not attending is pretty sizeable. Let us not forget, either, the inconvenience to all those witnesses who *do* turn up, but who are not called, because those who have failed to attend mean that the trial cannot proceed.

That is the headline picture. Having seen the figures for nearly a couple of years now I can say that they are fairly static. I suggest that we are all responsible to some degree.

Whatever the category, progress frustrated means justice delayed - and perhaps justice never done. That's *why* it's important. Now the *how*. What can <u>we</u> do?

Well, action has been taken. For starters, we now have Rule 3.8 (4), something which will focus attention to the issue by giving us a specific duty. As I have just said, witnesses are the

parties' not the court's. However, I'm a firm believer in the value of asking questions as a means of promoting and achieving progress. Even if we know what the answers to the questions might be.

Thus, in robust case management mode, at the point we fix a trial we should be asking the CPS about whether they have received from the police - via the MG 11 form, I believe - information about witness availability or witness needs: special measures in particular; but other measures, also. And asking the defence, too, what arrangements they need for their witnesses.

Other simple measures we can take to meet the Rule include, for example,

- ❒ making sure that we don't fix trials in the afternoon where witnesses have children to collect from school.
- ❒ taking into account the witness who has to get home at a certain time to look after a sick relative.
- ❒ checking whether physical access to, or egress from, the court buildings may be a problem.

Staggering witness attendance times can reduce waiting, too.

Very often all the information we want will not be available; but sometimes it will be. Either way, asking the parties as early as possible about these and other practical points can make a huge difference to the progress - or otherwise - of a trial. The difference between witnesses feeling encouraged and enabled, rather than being put off entirely. And that's before they contemplate actually giving evidence.

Of course, where trials *are* ineffective or crack, it's essential that the bench itself completes the reasons logging form, as fully as possible. Making completely clear what has - or rather what has not - happened and why and perhaps asking for feedback.

That is the court's active engagement in the process of helping to ensure that we meet the requirement of Rule 3.8(4). There are things that we should do outside court, too. They include:

- ❒ checking with Courts Boards to see if area business plans have a commitment to witness attendance included in them. There is certainly a national drive for plans to do so.

- ❒ checking to see if local criminal justice boards monitor the effectiveness of their witness care teams and what that monitoring reveals.

- ❒ attending court user meetings and asking if the witness service is getting the information it needs from the care teams so that it can do its job effectively.

- ❒ finding out if there is a local memorandum understanding between the care teams and the witness service? If not, would one be helpful?

- ❒ making sure that JIGs and judicial leadership groups focus on witness attendance when they go through the ineffective and cracked trial performance data.

- ❒ asking bench chairs and legal advisers to report to their benches about local performance on these points.

- ❒ simpler still, making sure that pre-trial court visits are routinely arranged and that all witnesses will be sent the HMCS DVD about being a witness - called *Going to Court*.

I am in no doubt that drawing attention to the attendance problem - asking the right questions at the right time - and not letting it go, helps to focus attention and moves the issue up the local criminal justice agenda. More importantly, I believe it will help to improve attendance.

Let me add that these sorts of initiatives would sit four square with other work across HMCS nationally and in some local areas. In my area, Bedfordshire, Essex and Hertfordshire, for example, they are doing research into the ineffective and cracked reasons: the reasons for the reasons, in other words. That is to say, trying to find out if non-attendance is more prevalent in particular sorts of cases, such as domestic violence; and if non-attendees are more likely to come from particular parts of our communities. That research will build into national initiatives.

They are also working with the police to revamp the relevant MG forms to improve the witness data collected, so that the CPS is better informed in court.

Another area is mapping the *witness journey* to see where the pinch points are. OCJR, too, continues its extensive work on the issue.

All this fits in turn with the thrust of important recent reports covering witnesses' experiences. Such as the NSPCC's and the Nuffield Foundation's *Measuring Up* report by Joyce Plotnikoff and Richard Woolfson and Sara Payne's report, *Redefining Justice.*

One Rule won't change the world. However, if we use Rule 3.8(4) alongside the things others are doing, we can make a real difference. A difference between a thousand trials a month not going ahead as planned - and which may never go ahead - and at least some of those thousand steaming forward as effective case management demands.

The Rule is there to be used.

Finally, if you have felt that I have been giving you egg-sucking lessons, thank you for indulging me. If not, I hope that my comments have been helpful.

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