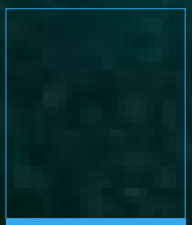

Stevenson: raises difficult issues

SHOWING

Defendants are now required to provide written notice of the witnesses they seek to call at trial. Monica Stevenson considers the likely pitfalls

Over the last decade criminal practitioners have been greeted with a deluge of legislation, the effect of which has been to increase case workloads at the same time as the government has panicked over the cost of paying lawyers to deal with it all.

Continuing the trend is the new requirement that defendants provide written notification of those witnesses they intend to call at trial. This change is ushered in by virtue of s 6(c) of the Criminal Procedure and Investigations Act 1996 ("CPIA") (as amended by s 34 of the Criminal Justice Act 2003 ("CJA 2003")) which entered the statute books seven years ago but only came into force on 1 May 2010. It is accompanied by regulations, the Notification of Intention to Call Defence Witnesses (Time Limits) Regulations 2010, SI 2010/214 ("the 2010 Regulations"), and a Code of Practice for Conducting Interviews of Witnesses Notified by the Accused ("the Code").

Adverse inferences

The upshot of a failure to comply with the 2010 Regulations is that an adverse inference can be drawn against the defendant (s 11(4) and (7) of the CPIA 1996, as amended by s 39 of the CJA 2003).

As with silence in police interviews, juries will not be permitted to convict *solely* on the basis of such inferences but may none the less treat non-compliance as *additional evidence* in support of the prosecution case (ss 11(5) and (10) of the CPIA 1996, as amended by s 39).

One of the early objections voiced by the Bar Council to the proposal when the CJA 2003 had its passage through Parliament seized on the obvious tension between this provision and the core principle that a defendant is not required to establish his innocence. The point bears examination: should a defendant be penalised for failing to provide advance notice of a witness which he has no evidential obligation to call in the first place?

It may be that in due course a defendant does his case a greater disservice by calling a witness at short notice than by not calling him or her at all. Such criticisms are arguably academic now that the provision is in force and so, however reluctantly, practitioners must master the regulatory framework if they are to properly protect the interests of their clients.

New disclosure duties

The new disclosure requirement will be mandatory in both the Crown Court and the magistrates' court and will apply in any case to which the disclosure provisions of Pt 1 of the CPIA 1996 apply on or after 1 May 2010, regardless of when the accused was charged or the underlying investigation began. In effect, this means any case in which the accused pleads not guilty in the magistrates' court on or after 1 May 2010, or any case which is sent/transferred to the Crown Court for trial by jury on or after that date. The accused's disclosure duty will be triggered by initial prosecution disclosure. The time limit is set out in the 2010 Regulations, and is 14 days in both the Crown Court and the magistrates' court. Where the accused fails to comply with the new disclosure requirement, the same sanctions will be available as for other defence disclosure failures (adverse comment by any party to the proceedings and adverse inference on the part of the court).

Points to note

- There is no distinction made between witnesses as to character and fact
- No provision appears to have been made for the funding of legal representation in respect of either the witness or defendants' solicitor
- No definition is provided of what is meant by an "interview"
- The defendant's solicitor should be informed of the date, time and venue for the interview

YOUR HAND

Time limit regulations

The time limits are set out in the 2010 Regulations. Written notice (including the name, address and date of birth of each witness) must be provided within 14 days of the prosecutor complying or purporting to comply with their disclosure obligations (under s 3 of the CPIA 1996).

During the consultation exercise held earlier this year in respect of the draft Code and draft regulations, it was pointed out by the Criminal Bar Association/Bar Council working group that if the requirement was triggered by *purported compliance* this could result in disclosure of the defence case *before* that of the prosecution. Scant regard appears to have been paid to the potential for injustice on this amongst other points.

As with defence statements, there is no provision for an "out of time" application which would allow the court to accommodate any justifiable delays, caused for example by a witness being abroad. An extension can be sought *within* the relevant time frame provided the court "… is satisfied that it would be unreasonable to require the accused to give notice within the relevant period".

Only time will tell if this timetable is realistic, but it is bound to require more (unremunerated?) work by litigators in the infancy of the case.

At the very least it is hoped that the judiciary will be alive to the practical difficulties involved in locating and tracking down witnesses (work and child care commitments, inadequate contact details provided by a client in custody etc). As any solicitor will tell you, pinning down a witness just to take an initial statement can be the stuff of nightmares and a drain on both resources and time.

The Code

(1) Interviews

Investigating authorities have a discretion as to whether they interview a witness named on the list. In turn, the witness is not obliged to attend but is entitled to be accompanied by a solicitor in the event that he does and must be asked whether he consents to the defence solicitor attending as an observer.

(2) Recording interviews

A record must be made of the interview wherever it takes place and must "where practicable" be by audio-recording or by visual recording with sound, "or otherwise in writing" (para 11.1). The latter must be a verbatim record or failing this, an account of the interview which adequately "summarises" it. It is not difficult to see how this feature has the potential for conflict in practice, with disputes

at trial about what a witness did or did not say. Moreover, there could in theory be three separate sets of notes on the point, namely that of the interviewing officer and legal representatives for the witness and for the defendant.

Juries ... may ... treat non-compliance as additional evidence in support of the prosecution case

(3) Conduct of interviews

The Code is deficient on a number of fronts including the absence of any guidance on how the discretion to interview a witness should be exercised. There is also no statement of principle regarding the general approach to such interviews and/or the remit of the exercise. It merely says that the investigator conducting the interview "must have sufficient skills and authority, commensurate with the complexity of the investigation, to discharge his functions effectively".

Concerns have been raised about the possibility of police officers deploying a more hostile approach to defence witnesses which, if borne out, could have the effect of deterring them from giving evidence. Clearly these interviews should amount to a fact finding exercise and not an opportunity for point scoring. Given the expressed fears, the silence of the Code on this point is regrettable to say the least.

Taking statements from potential witnesses has, up to now, often been a matter left to the end of a case, with statements sometimes being taken a matter of days before or even at trial. Under the new provisions, this culture almost certainly looks set to change.

It remains to be seen if the rules will be observed in practice, bearing in mind that a decision can rarely be taken on a witness before careful consideration of the prosecution papers, receipt of legal advice and a strategic overview of the case.

Conclusion

Whilst created no doubt with case management firmly in mind, the requirements will inevitably lengthen the trial process by virtue of additional legal argument and more directions for juries. Emerging case law on the topic will no doubt go some way to fixing the goalposts, but it is a shame that so much is being left to chance. ❖

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