

# *Witnesses Giving Evidence: Getting it right first time*

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Penny Cooper & Nicola Kohn

# What we will cover

- The essence of great witness preparation for civil cases
- Improving the quality of witness evidence - case law, rules, practice directions and judicial guidance
- Extra special adjustments in courts and tribunals, including when to use witness intermediaries
- Case examples

# Witnesses giving evidence

- The principle of ‘effective participation’
- Practitioners’ views on what participation entails ([Jacobson & Cooper](#), in press) – includes provision of and elicitation of information for the court/tribunal but also being informed, being protected etc.
- What is the ‘best evidence’ from witnesses for the court or tribunal?
- ‘Complete, coherent and accurate’

# The essence of great witness preparation in civil cases

- Building rapport with your witness is vital for good preparation for statements and for preparing a witness for the hearing
- Eliciting information - not just about the dispute but how they feel about giving evidence
- An opportunity for mock cross-examination, *within* the rules – [R v](#)

[Momodou](#) [2005]

# Guidance in the Equal Treatment Bench Book

- ‘ETBB’ Amended 2020 – 409 pages
- Also now *Good Practice for Remote Hearings* (GPRH’)
- Both the ETBB and the GPRH: ‘Effective communication underlies the entire legal process: ensuring that everyone involved understands and is understood. Otherwise the legal process will be impeded or derailed.’
- Also see [theadvocatesgateway.org](https://theadvocatesgateway.org)

# Procedure Rules

- Jurisdiction specific case law, rules and PD's. For example:
- CPR 22.3: 'If the maker of a witness statement fails to verify the witness statement by a statement of truth the court may direct that it shall not be admissible as evidence.'
- PD 22 has more detail and PD 35 for expert witnesses.

# Judges on witness statements in civil cases

- ‘Witnesses were interviewed and notes taken but the statements were not drafted for many months or even years. This is not a method likely to achieve the best evidence...’ Thirwall LJ in *Marsh v Ministry of Justice* [2017] EWHC 1040 (QB)
- ‘The true voices of the witnesses, and the extent of their real recollection, which became apparent when they were cross-examined over a number of days each, are notably lacking from the witness statements.’ Fancourt J in *Estera Trust (Jersey) Ltd & Anor v Singh & Ors* [2018] EWHC 1715 (Ch)

# Civil Justice Council

Aug 2019  
*and*

*Vulnerable Witnesses  
Parties Within Civil  
Proceedings* consultation

Feb 2020

155 page [report](#) with 18  
recommendations for change



# CJS recommendations for civil cases include...

- ‘Amending the overriding objective to reflect the need to ensure: (i) that all parties can fully participate in proceedings; (ii) that all witnesses can give their best evidence’ [335a]
- ‘Questionnaires for...information as to the vulnerability or potential vulnerability of a party...[including] an obligation to disclose whether a party know details of the vulnerability of another party or a witness.’ [337]

# Special/extra special 'measures' often used in crime/family

- Video links
- Video recording
- Screens
- Removal of wigs and gowns
- Supporters (including the furry kind)
- Aids to communication
- Witness intermediaries, etc.

# Intermediaries: CJC Recommendations

- ‘The Ministry of Justice and HMCTS should jointly review the availability and use of intermediaries in the Civil Courts as a matter of urgency. There is a clear need to recruit and train intermediaries for the civil and family courts.’ [350]
- ‘Guidance is needed for all court users (and Judges) in relation to the availability, use and funding of intermediaries in civil courts.’ [351]

# Witness intermediaries already used very widely

- In witness interviews.
- In courts & tribunals: criminal, family, civil, mental health, employment etc.
- They assess the witness, report on communication and assist with interview/cross-examination.
- None at interview? It is not too late for court/tribunal hearing.
- ‘Ground rules hearing’ required. ([Cooper, Backen and Marchant, 2015](#))

# We can look to the eligibility criteria in YJCEA 1999

- Section 16 Youth Justice and Criminal Evidence Act
- Under 18
- Or quality of their evidence diminished by reason of
  - ‘mental disorder’
  - ‘significant impairment of intelligence and social functioning’
  - ‘physical disability’ or ‘physical disorder’.

# Family Justice

Thorpe LJ in [Re M \(A Child\)](#) [2012] EWCA Civ 1905:

- ‘[The trial judge] fell into error in adopting the "let's see how we get on" management policy...it risks having to adjourn not at the optimum moment before the trial is launched, but at a very late stage, when things have run off the rails and then there is simply further wastage of court time.’

# Intermediaries in civil cases

The first time an intermediary used in a QBD case: [Connor v Castle Cement & Ors](#) [2016] EWHC 300 (QB) – though ultimately it was not possible to question the claimant over video link even with the intermediary.

# Another civil case

## *Kimathi & Ors v The Foreign And Commonwealth*

*Office* [2018] EWHC 2066 (QB) Parties agreed a memorandum of understanding regarding special measures.

- ‘The witnesses should be given breaks during their evidence.
- That both translator and witness should be visible at all times during the video link.
- That the witness would be allowed a companion in the room whilst he or she gave evidence.
- That wigs and gowns would not be worn.

It was agreed that intermediaries would not be used, it being impossible to find a suitable intermediary.’ [78]



# BTQ much better than ATQ

*Before the questioning* of a witness in a hearing, make sure:

- The witness has had *effective witness preparation*

And you should know:

- If they are likely to need adjustments to traditional procedures
- What special adjustments are required and why
- Whether adjustments for the hearing are opposed and, if so, when an application will be made and,
- If the application is granted, when the *ground rules hearing* will take place.

# Using an intermediary

- Case examples
- Finding and funding
- Making an application

# Ground Rules

**AND UPON** the parties agreeing that the following ground rules shall apply to the final hearing in relation to the intermediary for BB:

**Oath** - to be taken at commencement of hearing

## **Breaks**

- (i) To be taken hourly for 15 minutes throughout evidence to allow for explanation by the intermediary, short break by BB
- (ii) To be taken every 20 minutes during BB oral evidence
- (iii) During the hearing, should BB be in difficulty or require an additional break, the intermediary will raise his hand

## **Questions**

- (i) Importance of short questions
- (ii) No tagged questions
- (iii) Questions for BB to be provided the night before for consideration by the intermediary; they will not be supplied to BB in advance of cross-examination

## **Role in listening to proceedings**

The intermediary will sit next to BB and take notes and explain proceedings and the evidence to him.

# Morrow v Shrewsbury RFC

## [2020] EWHC 379

46. The intermediary's contribution to the proceedings was negligible. On a couple of occasions, she asked whether the court could take a break during the evidence but I was unsure why she chose those moments to make such a request as opposed to other moments. She gave some minimal assistance to the claimant when he was looking for documents in the bundles but he was capable of finding the documents for himself.

47. The claimant gave no indication that he could not follow questions or that he could not give the answers that he wanted to give. The intermediary did not raise any comprehension or communication difficulties with the court.

48. Mr Brown conducted his cross-examination with conspicuous fairness. He took matters slowly and carefully so that the claimant could follow the questions. As I have mentioned, I permitted the claimant to take blank paper into the witness box as an aid to concentration. He did not appear to use the paper. He gave evidence forcefully and fluently.

49. I have strong reservations about whether any of the ground rules were necessary. The intermediary served no useful role. Nothing that the intermediary did could not have been done by counsel and solicitors performing their well-defined roles founded on training, experience and professional ethics; or by the court in the exercise of its wide discretion to control proceedings and having the benefit of extensive expert evidence.

# Recital

- **AND UPON** the court further recording that
- *Xx has a learning disability and will be assisted by the provision of an intermediary for the purposes of any capacity hearing*
- *Solicitors for xx have made contact with Communicourt intermediary services who have confirmed that an assessment of xx which would be necessary prior to instruction could be carried out within a 6 week timeframe at a cost of &xx, but that there would be an additional cost of the intermediary also attending the final capacity hearing;*
- *The costs of an intermediary are not recoverable under xx's legal aid certificate and the court, deeming such costs to be necessary for allowing xx's participation in this case, authorises the costs to be paid by HMCTS*

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