



Neutral Citation Number: [2024] EWHC 3138 (KB)

Case No: KB-2023-MAN-000173

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**MANCHESTER DISTRICT REGISTRY**

The Civil Justice Centre  
Manchester

Date: 5 December 2024

**Before :**

**HIS HONOUR JUDGE BIRD**

**Between :**

**CXC**  
**(a protected party by her litigation friend BXB)**

**Claimant**

**- and -**

**(1) DAVID CLARKE**  
**(2) EUI LIMITED**

**Defendant**

**Mr Marc Willems KC** (instructed by Blackburn Law Birchall) for the **Claimant**  
**Mr James Arney KC** (instructed by Horwich Farrelly Limited) for the **Defendant**

Hearing dates: 25 November 2024

**Approved Judgment**

This judgment was handed down remotely at 10.30am on 5 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**HIS HONOUR JUDGE BIRD**

## **His Honour Judge Bird :**

### **Introduction**

1. On 16 September 2007, the Claimant (who was then 20 years old) was involved on a road traffic accident whilst a passenger in a car driven by the first Defendant. As a result of the first Defendant's admitted negligence the claimant suffered a severe brain injury and other injuries including a fracture to her jaw. The claim was settled on 25 May 2009, before issue, in the total sum of £25,000. By these proceedings, the Claimant seeks an order that the settlement be set aside on the basis that the Claimant lacked capacity to conduct litigation from 2007.
2. The Claimant was involved in a further road traffic accident in 2016. The injuries suffered may have affected her capacity. It follows that an assessment of her capacity now (or at trial) is unlikely to shed light whether she had capacity in the period from 2007 to 2009. The issue of capacity at that time is (as Mr Arney KC puts it in his skeleton argument) "*firmly in dispute*".

### **The Applications**

3. On 24 July 2024, the Claimant's solicitors made an application for permission to obtain a report from a registered intermediary to advise on how the Claimant will best be able to engage in the proceedings and for an order that HMCTS pay the costs of obtaining such a report. On 19 September 2024, the Claimant made a further application to extend time for the Claimant to serve her witness evidence. This judgment deals with those applications.

### **Intermediaries and the court system**

4. The criminal and family courts have a great deal of experience of intermediaries. The Family Proceedings Rules ("FPR") deal with intermediaries and vulnerable witnesses and parties at FPR 3A and at FPR PD 3AA and the Criminal Procedure Rules ("CrimPR") deal with measures to help a witness or a Defendant to give evidence or otherwise participate at Part 18 and CrimPR PD 6. Both sets of rules are comprehensive.
5. The Family Court has also provided guidance on the use of intermediaries in *A Local Authority v A B X and Y* [2024] EWHC 906 (Fam) and *West Northamptonshire Council v KA and NH* [2024] EWHC 79 Fam. In both cases, the Court followed guidance set out in the leading case on the use of intermediaries in the Crown Court *R v Thomas (Dean)* [2020] EWCA Crim 117.
6. The Civil Procedure Rules ("CPR") take a less prescriptive approach. On 6 April 2021 (after the decision in *Morrow* referred to below) the overriding objective was amended to make clear that full participation in proceedings and ensuring that witnesses can give their best evidence is an integral part of dealing with cases justly. PD 1A was introduced at the same time and has since been updated.
7. Given the similarities in the approach adopted by the Family Courts and in the Crown Court, the general aim of all courts to secure a fair hearing and the limited guidance

set out in the CPR, it is helpful to consider how the CrimPR and the FPR deal with intermediaries and vulnerable persons.

8. A common theme that runs through how the Crown Court (CrimPR 18.23(1)(b)), the Family Court (FPR 3A.4 and 3A.5) and the civil courts (PD 1A paragraph 6) deal with directions to assist vulnerable persons is that the directions must be *necessary*. It is not enough that they would be helpful. That is the thrust of the guidance set out in those cases cited at paragraph 5 above.

### **What is an intermediary?**

9. Section 29 of the Youth Justice and Criminal Evidence Act 1999 (“the 1999 Act”) allows the Crown Court to direct that the examination of a witness (not the Defendant) should be conducted through an interpreter or other person approved by the court. It defines that person as an “intermediary” and describes their function as:
  - i) [communicating] to the witness, questions put to the witness, and
  - ii) [communicating] to any person asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.
10. The role of the intermediary is further explained in CrimPr 18.3 and CrimPr PD 6. Intermediaries facilitate communication with witnesses and defendants who have communication needs. Their primary function is to improve the quality of evidence and aid understanding between the court, the advocates and the witness or defendant. Intermediaries are independent of parties and owe their duty to the court.
11. The FPR broadly adopt the 1999 Act definition and define an intermediary at FPR 3A.1 but make it plain that the intermediary’s role extends to parties and is not limited to non-party witnesses.
12. In *Morrow v Shrewsbury RUFC* [2020] EWHC 379 (QB) Farbey J explained the role of the intermediary in this way at paragraph 23:

*“The intermediary’s role is to assist the witness to understand questions and communicate answers. It is not a general witness support role which is provided by others within the criminal justice system. An intermediary is independent of the parties and owes his or her duty to the court.”*
13. Although these definitions tend to suggest that the intermediary’s role is limited to assisting those who give evidence, it is clear that the court has the power to direct that an intermediary provides support to allow a party to participate fully in the proceedings even if they do not give evidence.
14. In the present case it is anticipated that an intermediary would “*review the claimant’s medical evidence, undertake an assessment and prepare an initial intermediary report to identify the needs of the claimant and set out any measures that should be put in place to ensure the claimant has effective participation, providing recommendations*

*for both how the trial process itself and the questioning of the claimant should be varied and establish ground rules.” (see paragraph 13 of Mr Taylor’s statement of 26 July 2024) and “assess and report on the claimant’s communication needs and provide professional support so the claimant can participate effectively in legal proceedings they will also be able to provide impartial recommendations to the court about any specific communication needs and any steps required to meet those needs. In addition, the intermediary will be able to support the claimant at the preliminary hearing assisting in rephrasing questions and making sure the claimant understands and follows what is occurring during those proceedings if required” (see paragraph 15).*

### **Practice Direction 1A**

15. As a first step, the court is required to identify if a party or a witness is vulnerable (paragraphs 2 to 4) and then determine if that vulnerability is likely to restrict that person’s full participation in proceedings or the ability of that person to give their best evidence (see paragraph 5) in this judgment I will refer to such a vulnerability as a “relevant vulnerability”).
16. If a relevant vulnerability is identified, the Court should “*take all proportionate measures*” to deal with it (paragraph 2). I will refer to such measures as “protective measures”. The PD appears to draw a distinction between 2 general types of protective measures: “directions” (paragraph 6) and “provisions” (paragraph 7). There is a general discretion to “make provision” but directions can only be made when they are *necessary*.
17. In line with the need to act proportionately (doing no more than is necessary to address the relevant vulnerability), the court should first consider if a protective measure short of a direction is enough. Such provision may include “*concealing the address and/or contact details of either party or a witness for appropriate reasons*” (paragraph 7).
18. The Court must then consider “*if it is necessary to make directions*” to address the relevant vulnerability (paragraph 6). In a straightforward case the Court may conclude that directions are not necessary and that the provisions it has made are sufficient to address the vulnerability. In other cases, both provisions and directions may be required.

### **Identifying relevant vulnerability**

19. Until the relevant vulnerability is identified the Court cannot decide what protective measures are required.
20. In many cases it will be a straightforward matter to identify a relevant vulnerability (see the examples set out at paragraph 4 of PD 1A). For example, a young child, a person who cannot read or who uses sign language to communicate or who has an admitted learning disabilities can be taken to have a relevant vulnerability. In other cases, the exercise will be less straightforward.
21. Any less obvious, health related relevant vulnerability would need to be established by appropriate evidence. Sometimes (as in the present case where the potentially vulnerable person is a party) medical experts already instructed in the case are likely to

deal with the matter. In other cases, confirmation from a treating doctor might suffice. PD 1A and CPR 1.3 impose an obligation on the parties to assist the court in its endeavour to further the overriding objective by identifying relevant vulnerabilities

22. Once relevant vulnerability is established, PD 1A will be engaged and the court will need to consider what proportionate steps it can take to deal with the vulnerability. The nature and extent of the relevant vulnerability will be key to deciding what steps are proportionate.
23. In the present case, the Claimant's vulnerability is said to arise from brain injury acquired in 2007 (see paragraph 12 of Mr Taylor's witness statement of 26 July 2024). The parties have yet to exchange medical evidence and so the Defendant's position has not been crystallised. As things stand, the Defendant does not accept that the Claimant has a relevant vulnerability, and it is too early for the Court to determine the question.
24. The central issue in the present case is whether the Claimant had capacity at time the claim in respect of loss suffered in the 2007 incident was settled. Whether the claimant now has a relevant vulnerability is a separate question.

### **Giving Directions**

25. Where a person with a relevant vulnerability is to give evidence, the court will consider what directions, including "special measures", "ground rules" or other support, are necessary to comply with the overriding objective.
26. How the court will deal with directions (what if any to make and whether a hearing is required) will vary from case to case. In a straightforward case where, for example, the intermediary will have no involvement in the trial itself directions might be given without a hearing. CrimPR PD 6 notes that "*the greater the level of vulnerability the more important it will be to hold.....a hearing*" (see para.6.1.4).
27. The term "ground rules hearing" is not used in the CPR. CrimPR 3.9 defines what a ground rules hearing is in the Crown Court. It sets out the detail of what should happen at such a hearing and makes clear (see CrimPR 3.9(2)(b)) that "ground rules" relate to "*the conduct of questioning of the witness or defendant*".
28. The FPR deals with ground rules hearings at FPR PD 3AA paragraph 5. Such a hearing is required when a vulnerable person will give evidence and is to be held before the hearing at which the evidence is to be given.
29. PD1A gives the court a broad discretion in respect of the type of "special measures" that can be ordered when a person with a relevant vulnerability is to give evidence (paragraphs 8, 9 and 10). A non-exhaustive list is provided at paragraph 10 which exactly mirrors the "special measures" that may be deployed in the Crown Court (for witnesses but not for defendants) and which are set out at sections 23 to 30 of the 1999 Act (see CrimPR 18.1). One "*special measure*" the Court may order is that the vulnerable person be questioned "*through an intermediary*" (see PD 1A paragraph 10(f). The Crown Court equivalent is a direction under section 29 of the 1999 Act).

30. FPR3A.8 sets out a list of “measures” similar to the “special measures” set out at PD 1A paragraph 10. The FPR list includes a measure to provide for a party or witness to participate in proceedings with the assistance of an intermediary.
31. CrimPR 18.23 makes it clear that in the Crown Court if an intermediary is appointed the duration and purpose of the appointment should be considered.
32. A ground rules hearing therefore relates to the way in which the Court will make arrangements in respect of how a vulnerable person will give evidence. In practice, the making of arrangements to allow for a vulnerable party to participate fully in proceedings should be made at the same time. The name given to the hearing is unimportant. If an intermediary is potentially to be involved in the trial (whether to assist a witness or to support a party) arrangements should generally be made at a hearing and in the presence of the intermediary.

### **Intermediary’s report**

33. PD1A makes no reference to an intermediary report. It is however clear that such a report is likely to be a key factor for the court to consider when deciding what (if any) protective measures are to be made.
34. CrimPR 18.28 provides comprehensive guidance on the content of an intermediary’s report. It must (amongst other matters) explain why, in the particular case, intermediary assistance is thought to be necessary and make recommendations (with reasons) about the intermediary’s participation in the trial. It will necessarily address what is the minimum level of protective measure required.
35. The Ministry of Justice regularly publishes a “*Registered Intermediary Procedural Guidance Manual*”. Although the manual is directed at criminal proceedings, the then current version was cited with approval by the Court of Appeal in *Isbilen* [2024] EWCA Civ 568. Section 4 of the manual (paragraphs 4.19 to 4.38 in the 20204 version) sets out a model structure for the report which might form a usual basis for such a report in civil proceedings. It is not an expert report and therefore CPR 35 does not apply to it.

### **Is Permission to instruct an intermediary required?**

36. There is nothing in the CPR to suggest that permission to instruct an intermediary must be obtained. Such a requirement would be unusual. Even when dealing with expert evidence, the rules do not require permission be obtained before instructions are given. Permission is required before any such evidence can be relied upon at trial. It is commonplace for expert reports to be obtained and then for permission to rely upon the report to be sought.
37. Where the Crown Court is considering the appointment of an intermediary to facilitate the defendant’s effective participation in the trial it must consider “*recommendations in any intermediary’s report received by the court*” (CrimPR 18.23(2)(b)). CrimPR 3.9(3) requires that the Crown Court to have regard to any intermediaries’ report before “*setting ground rules*” or giving directions at a ground rules hearing.
38. The CrimPR make clear what is, in my judgment, implicit in the FPR and in PD1A, namely, that the intermediary’s report is required before the Court can consider if

directions for the use of an intermediary are necessary. Permission is required to use an intermediary but not to obtain an intermediary's report.

### **Directing the use of an intermediary**

39. Guidance given in the Family Court seems to me to be equally applicable in civil cases. Taking the guidance provided by Lieven J in *West Northamptonshire Council v KA and NH* [2024] EWHC 79 (Fam) and endorsed by Williams J in *A, B, X and Y* the following points emerge:
- i) The appointment of an intermediary to assist a witness giving evidence or to assist a party to participate in proceedings is a matter for the Court. The agreement of the parties does not, of itself, justify appointment. The Court is free to depart from recommendations made in the intermediary's report.
  - ii) An intermediary should only be appointed if the appointment is necessary.
  - iii) Appointment will only be necessary if lesser steps (directions or provisions) would not be sufficient to address the vulnerability.
  - iv) If an intermediary is to be appointed, their role and the periods of engagement should be specified. Each should be no more than is necessary. A "whole trial" order would be "exceptionally rare".
  - v) In dealing with these issues the Court can proceed on the basis that advocates (who will be aware of the relevant vulnerabilities) will prepare appropriately in particular by being familiar with the guidance set out in the "Advocate's Gateway" and will adapt the style in which they pose questions to the particular circumstances of a given witness. The Court can also proceed on the basis that the court process will have been explained to a client or a witness in appropriate language before the start of the hearing.

### **The Applications**

40. For the reasons I have given there is in my judgment no requirement for permission to instruct an intermediary. It is in any event premature to consider instruction because the extent and nature of any vulnerability and whether the vulnerability is a relevant vulnerability remains unclear. I therefore dismiss the application for permission.
41. I propose to adjourn the question of extending time for the Claimant's witness evidence to be served to a date to be set on the application of the Claimant. That application would best be dealt with once the issue of relevant vulnerability has been resolved.

### **The cost of instruction**

42. HMCTS appear to meet the general costs of intermediaries. The application seeks an order that HMCTS pay the costs of instructing the intermediary. As I have dismissed the application for permission to instruct, I need not deal with the issue of costs. In my judgment, given that HMCTS have policies in place dealing with payment it would in any event be better to leave the issue of payment to the usual application process. If HMCTS wrongly (in breach of their stated policies) refuse to pay, then the proper

remedy is likely to be a public law remedy. In any event, before I made any order against HMCTS in respect of costs I would want to hear from them which would probably involve having them joined in to the proceedings.

**The way forward in this case**

43. If the Claimant has a relevant vulnerability, I would expect an intermediary to be instructed to produce a report. Depending on the content of the report I would then expect there to be an application for protective measures to be taken in respect of the vulnerability. I would expect the application to rely heavily on the report and to include a draft of the order (including if appropriate ground rules for the taking of evidence). If the intermediary has recommended that they attend the trial, the directions and other measures should be considered at a hearing with the intermediary in attendance.
44. Vulnerable parties have the same rights to participate in a trial as non-vulnerable parties. The court will take steps to ensure that those rights can be enjoyed. It will expect all parties to assist in that endeavour.