

Case note: Opposing the Instruction of Defendant's proposed expert at CCMC. Participation of vulnerable parties or witnesses in litigation

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On 6th April 2021, CPR Part 1, the Overriding Objective, was amended by the addition of CPR 1.6 and [Practice Direction 1A](#) which makes provision for how the court is to give effect to the overriding objective in relation to vulnerable parties or witnesses. At a CCMC on 9th April 2021, in what must be one of the first hearings at which the new PD was considered, the Claimant succeeded in preventing the Defendant instructing their favoured psychiatric expert in a historic sexual abuse case on the basis of the new provisions.

The Claimant alleged sexual abuse by a priest from the ages of 15 to 19. She sought general damages for psychiatric injury and special damages largely consisting of loss of earnings, past and future. The case is one of many brought by victims of historic sexual abuse in relation to the church, to children's homes, by public figures, such as Jimmy Savile, and at football academies. The instant case, like many others, was, and is, robustly defended on the basis of consent and causation. Limitation was also raised.

It was clear from online publications that the Defendant's proposed expert had been subject to criticism and complaints by victims of sexual abuse (although these were dismissed by the GMC). The Claimant sought to oppose his instruction on the basis that he had spent his working life in forensic psychiatry, ie treating mentally-ill offenders, and that his experience of sexual abuse victims appeared to be largely, if not entirely, medico-legal. The Claimant noted that case reports in which his name was mentioned suggested that he had almost exclusively been instructed by the Defendant in recent years in historic sex abuse cases.

Reference was made to the new PD which provides:

- The overriding objective requires that, in order to deal with a case justly, the court should ensure, so far as practicable, that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence. The parties are required to help the court to further the overriding objective at all stages of civil proceedings.*
- Vulnerability of a party or witness may impede participation and also diminish the quality of evidence. The court should take all proportionate measures to address these issues in every case.*

3. *A person should be considered as vulnerable when a factor—which could be personal or situational, permanent or temporary—may adversely affect their participation in proceedings or the giving of evidence.*
4. *Factors which may cause vulnerability in a party or witness include (but are not limited to)—*
 - (i) Age, immaturity or lack of understanding;*
 - (ii) Communication or language difficulties (including literacy);*
 - (iii) Physical disability or impairment, or health condition;*
 - (iv) Mental health condition or significant impairment of any aspect of their intelligence or social functioning (including learning difficulties);*
 - (v) The impact on them of the subject matter of, or facts relevant to, the case (an example being having witnessed a traumatic event relating to the case);*
 - (vi) Their relationship with a party or witness (examples being sexual assault, domestic abuse or intimidation (actual or perceived));*
 - (vii) Social, domestic or cultural circumstances.*
5. *When considering whether a factor may adversely affect the ability of a party or witness to participate in proceedings and/or give evidence, the court should consider their ability to—*
 - (a) understand the proceedings and their role in them;*
 - (b) express themselves throughout the proceedings;*
 - (c) put their evidence before the court;*
 - (d) respond to or comply with any request of the court, or do so in a timely manner;*
 - (e) instruct their representative/s (if any) before, during and after the hearing; and*
 - (f) attend any hearing.*
6. *The Court, with the assistance of the parties, should try to identify vulnerability of parties or witnesses at the earliest possible stage of proceedings and to consider whether a party's participation in the proceedings, or the quality of evidence given by a party or witness, is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make directions as a result.*
7. *If the court decides that a party's or witness's ability to participate fully and/or give best evidence is likely to be diminished by reason of vulnerability, the court may identify the nature of the vulnerability in an order and may order appropriate provisions to be made to further the overriding objective.*
8. *Subject to the nature of any vulnerability having been identified and appropriate provisions having been made, the court should consider ordering "ground rules" before a vulnerable witness is to give evidence, to determine what directions are necessary in relation to the nature and extent of that evidence, the conduct of the advocates and/or the parties in respect of the evidence of that person, and/or any necessary support to be put in place for that person.*

The Defendant, in seeking permission to rely upon their proposed expert, argued that he was well aware of his duty to the Court pursuant to CPR 35.3, that it would be surprising for the court to refuse the Defendant's choice of expert, that the expert had extensive experience of involvement in historic sexual abuse cases and had been praised by the judiciary on a number of occasions.

The judge declined permission to the Defendant to rely upon the expert. He held that he did not consider the fact that the expert was a forensic psychiatrist to be a bar since this was a specialty of general psychiatry and that he was sure that the expert would be well aware of his duty to the court pursuant to CPR 35.3. He emphasised that he was not critical of the expert in any way and that none of his comments should be construed in the slightest way as being critical.

However, he noted that paragraph 2 of the new PD required the court to take "all proportionate measures" to ensure that the Claimant could give her "best evidence" (paragraph 1). He took judicial notice of the fact that the Claimant was a vulnerable witness [paragraph 3 in fact provides that a person should be considered as vulnerable when a factor may adversely affect their participation in proceedings or the giving of evidence]. He held that in light of the various online publications which could "easily be found by the Claimant" this may have a "dramatic effect" on her and, in particular, would affect how she would interact with the expert. He held that it was more likely than not that the quality of her evidence would thereby be diminished and therefore declined to grant the Defendant permission to rely upon the expert noting that there were "hundreds of consultant psychiatrists" from whom they could choose.

The Claimant also raised the issue of how the criminal convictions of the priest should be dealt with (which arose out of his abuse of the Claimant but were very limited). The rule and PD arose out of a consultation and subsequent Civil Justice Council document "[Vulnerable Witnesses and Parties within Civil Proceedings](#)". In relation to criminal convictions, paragraph 191 of that document notes that:

Given the lack of certainty as to the extent to which a Defendant in a civil claim can seek to "prove the contrary" of the conviction by seeking to re-run the defence used in the criminal trial it is essential that at the case management stage the Court considers whether it is necessary to clarify the basis upon which the convictions are to be challenged and what orders should be made in respect of the evidence to be adduced (bearing in mind the wide power provided by CPR 32.1); which may include:

- (a) Consideration of the extent to which evidence within or transcripts of the criminal trial should form the evidence considered by the court;*
- (b) a requirement that the Defendant presents his/her evidence first.*

In the instant case, the fact of the convictions had been noted but it was unclear whether the Defendant would seek to go behind those convictions in relation to consent.

Further, paragraph 8 of the PD requires the court to consider the making of "ground rules" "before a vulnerable witness is to give evidence, to determine what directions are necessary in relation to the nature and extent of that evidence". Paragraphs 193 and 195 of "[Vulnerable Witnesses and Parties within Civil Proceedings](#)" suggests that this can either be at case management stage or at a hearing specifically listed to consider the issue. Ground rules, per paragraph 195, could include an order that a party submit a list of questions in advance of the hearing and that the Judge will conduct questioning.

With reference to the issues of the criminal convictions and the ground rules, the judge ordered that at the PTR the following should be considered:

- 1. On what basis (if at all) the convictions are to be challenged.*
- 2. How the evidence within and transcripts of the criminal trial are to be dealt with at trial.*
- 3. The potential making of ground rules in relation to the giving of evidence by any vulnerable witness at the trial.*

Comment

It is clearly correct that the Claimant in relation to issues which are intensely painful and embarrassing would be reluctant to discuss such matters openly with someone who she could readily see, via a Google search, had been subject to significant criticism by other victims of abuse. This would impede her evidence and, accordingly, prevent the parties being on an equal footing.

Practitioners should bear in mind the repercussions of this outcome, particularly in an age where parties (and presumably their legal representatives) can readily access information about expert witnesses online.

The factors which may cause vulnerability in a party or witness, set out at paragraph 4 of the PD, are wide. They include not only the impact on the party/witness of the subject matter of the case but also issues such as their social, domestic or cultural circumstances and communication or language difficulties. Further, as noted, a party or witness should be considered vulnerable when their participation in proceedings or in the giving of evidence *may* be adversely affected.

Courts should try to identify vulnerability at the "*earliest possible stage of proceedings*" (paragraph 6) and to consider whether the quality of their evidence is likely to be diminished by reason of that vulnerability. Courts should consider ordering "*ground rules*" (paragraph 8) before vulnerable witnesses give evidence. As in the instant case, it is suggested that ground rules may best be dealt with at PTR stage when the evidence to be called by the parties has become clear.

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