





Vulnerable witnesses /parties in family proceedings

Amanda Weston KC and Amanda Meusz

Garden Court Chambers



Overview

1. Law, procedure and guidance
2. Essential Cases
3. Strategies for communication



Law, procedure, guidance



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Legislation

- Equality Act 2010 – ‘judicial functions’ are exempt from the prohibition on discrimination in the exercise of public functions, but this exemption appears to cover only the core adjudicative and listing functions. Ancillary functions, such as employment or managerial functions not exempt: *Engel v Joint Committee for Parking and Traffic Regulations Outside London* (PATROL) 0520/12 EAT 13
- Domestic Abuse Act 2021 – courts required to make arrangements for QLRs to conduct XX of complainant where alleged abusive party unrepresented – need to identify vulnerabilities BEFORE involvement of QLR
- Human Rights Act 1998 – article 8 procedural safeguards, article 14 discriminatory failure to protect rights on an equal footing, absence of justification for differential treatment – grounds of appeal:



Procedure

- FPR - Vulnerable Persons: Participation in Proceedings and Giving Evidence.
 - Part 3A
 - PD 3AA
- The Overriding Objective – FPR r. 1:
 - (a) ensuring that it is dealt with expeditiously and fairly;
 - (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
 - (c) ensuring that the parties are on an equal footing;**
 - (d) saving expense; and
 - (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.



The Overriding Objective (cont'd)

- (1) The court must further the overriding objective by actively managing cases.
- (2) Active case management includes–
 - (a) setting timetables or otherwise controlling the progress of the case;
 - (b) identifying at an early stage–
 - (i) the issues; and
 - (ii) who should be a party to the proceedings;
 - (c) deciding promptly –
 - (i) which issues need full investigation and hearing, and which do not; and
 - (ii) the procedure to be followed in the case;
 - (d) deciding the order in which issues are to be resolved;
 - (e) controlling the use of expert evidence;
 - (f) encouraging the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
 - (g) helping the parties to settle the whole or part of the case;
 - (h) encouraging the parties to co-operate with each other in the conduct of proceedings;
 - (i) considering whether the likely benefits of taking a particular step justify the cost of taking it;
 - (j) dealing with as many aspects of the case as it can on the same occasion;
 - (k) dealing with the case without the parties needing to attend at court;
 - (l) making use of technology; and
 - (m) giving directions to ensure that the case proceeds quickly and efficiently.
- (1) Nothing in the overriding objective undermines the principles provided by section 1 of the Welsh Language (Wales) Measure 2011
 - (1) that the Welsh language has official status in Wales or by section 22 of the Welsh Language Act 1993;
 - (2) that in any legal proceedings in Wales, the Welsh language may be used by any person who desires to use it.
- (2) The parties are required to assist the court to put into effect the principles set out in paragraph (1).



Guidance

- Advocates Gateway Toolkits
- Equal Treatment Bench Book, Guide to Judicial Conduct (Bangalore Principles)
“independence, impartiality, integrity, propriety, **ensuring equality of treatment**, and competence and diligence”
- Specialist Resources - see list – Good Practice Guidance
- Essential takeaway – court’s tendency to see ‘vulnerability’ as a single concept leads to injustice – ‘vulnerabilities’ are a context and person-specific constellation of effects on effective participation and courts need to be pressed to adopt person-centred, flexible and bespoke solutions to ensure access to justice and recognize that communication needs may be affected by a range of factors holistically not just diagnosed MH or LD issues.



Reasonable adjustments

- Courts are expected to make reasonable adjustments to remove barriers for people with disabilities, including specific learning difficulties (Judicial College, 2018, Equal Treatment Bench Book), mental disabilities, specific learning difficulties and mental capacity, giving effect to the Equality Act 2010).



Equal treatment (Bench Book)

- Emphasises the importance of equal treatment and adapting practices to enable a fair hearing
- In the 2013 Toulmin Lecture, the Lord Chief Justice, Lord Judge, said that:
 - *‘Just because a change does not coincide with the way we have always done things does not mean that it should be rejected....Do proposed changes cause unfair prejudice to the defendant?: if so, of course, they cannot happen. If, however, they make it more likely to enable the truth to emerge, whether favourable or unfavourable to the defendant, then let it be done. The truth is the objective’.*²³
- These principles have been reflected in criminal and family appellate decisions. For example:
 - *‘When necessary, the processes have to be adapted to ensure that a particular individual [in this case, a defendant with complex needs] is not disadvantaged as a result of personal difficulties, whatever form they may take’.*²⁴
 - A judge's general duty to manage all cases to achieve targets ‘cannot in any circumstance override the duty to ensure that any litigant... receives a fair trial and is guaranteed what support is necessary to compensate for disability’.²⁵ In this case, the Court of Appeal found a breach of article 6 rights where, despite a report recommending special measures, a father of ‘limited capacity’ gave evidence in family proceedings with only ‘unsatisfactory makeshift’ arrangements.
 - *M (A Child)* 2012 EWCA



Essential Cases



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A Local Authority v Mother & Ors [2021] EWHC 2794 (Fam)

Costs hearing following abandoned hearing due to deficiencies in the services of an unqualified/inexperienced intermediary.

“42. Intermediaries perform an extremely important function in ensuring a fair trial for highly vulnerable people in the family courts, usually parents. It is of great importance that they do that job to a professional standard and their role is properly considered and monitored, both at the stage of their appointment and during the conduct of the relevant hearings. Although intermediaries, certainly in the family courts, are not subject to any regulatory scheme, they are part of the justice system, and they are paid for their services by HMCTS. As such, they should be subject to professional standards appropriate for the role they are being paid to undertake. It would undoubtedly be helpful if these were set out in one document in a similar manner to the MoJ Guidance in relation to intermediaries in the criminal courts.

43. This case well illustrates how the lack of clear guidance on the use and roles of an intermediary makes it difficult to ensure an understanding by the person who puts themselves forward as an intermediary is competent to perform that role. The lack of such guidance also means that there is no definition on who may be appropriate to act as an intermediary, what training or qualifications they have, or what checks a judge or solicitor should undertake. This makes the appointment and conduct of the intermediary ripe for the kind of problem that arose in this case.

44. However, in my view, what went wrong in this case was the result of misrepresentation by DM and not a lack of guidance, or any default, by the Judge or the Father's solicitors. In his email to the Father's solicitors on 14 July he said that MH had acted as an intermediary for XX "numerous times" and that she was "competent". In fact, she had acted in one trial and DM had little or no basis for saying she was competent. He had not told her to read the Advocates Gateway, and self-evidently he had not checked whether she had understood it, or even in the widest sense understood her role.”



W v H [2022] EWFC 150

- Contested divorce proceedings
- H was obstetrician, recently diagnosed with Level 1 ASD postdating issue of divorce proceedings
- “These proceedings are, I think, an exemplar of how a Court needs always to be mindful of the need to consider an assessment for an intermediary even where the surrounding circumstances may not immediately alert the court to this. At first blush, he is not typical of Court users who are assessed for the support of an intermediary.” [7]
- No expert evidence sought, judge felt able to proceed based on TAG and ETBB.

79. I am satisfied, having heard the evidence and considered the reference material I have named, particularly the ETBB, that the Husband's autism is likely to have had a significant impact upon the manner he has behaved throughout the marriage (and where relevant, before the marriage). In so far as there was a period the Wife did not know of the diagnosis of autism it may be understandable that she may have reacted badly to aspects of the Husband's behaviour. Once, though, the Wife (as a trained and qualified social worker) was put on notice of the diagnosis, either formally or otherwise, it is appropriate to expect her to make such allowances or adjustments as are reasonable. Rather than making simple allowances, my view is that the Wife has sought to capitalise upon the Husband's autistic traits as evidence of behaviour to attempt to satisfy the test. I am not suggesting that any type of behaviour from someone who is autistic has to be tolerated; that would make a nonsense of the way the Court of Appeal has directed the test should be applied. I am looking at this marriage and this Petitioner and this Respondent.



Re N (A Child) [2019] EWCA Civ 1997

- The absence of an intermediary for M led to FF decision being set aside.

51. In my judgment, Part 3A and its accompanying Practice Direction provide a specific structure designed to give effective access to the court, and to ensure a fair trial for those people who fall into the category of vulnerable witness. A wholesale failure to apply the Part 3 procedure to a vulnerable witness must, in my mind, make it highly likely that the resulting trial will be judged to have been unfair.

60. In my judgment, it would go too far to say that a rehearing is inevitable in all cases where there has been a failure to identify a party as vulnerable, with the consequence that no ground rules have been put in place in preparation for their giving evidence and no Intermediary or other special measures provided for their assistance, but the necessity for there to be a fair trial must be at the forefront of the judge's mind. In such a case, whether there should be a retrial must depend upon all the circumstances of the case, not only, or principally, upon the likely outcome of a rehearing. I set out again for convenience, the observation of the ECHR in *P, C and S v UK*:

61. "There is the importance of ensuring the appearance of the fair administration of justice and a party in civil proceedings must be able to participate effectively, inter alia, by being able to put forward the matters in support of his or her claims. Here, as in other aspects of Art 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy." In my judgment, there was undoubtedly a fundamental breach of the mother's Article 6 rights and she was denied a fair trial. Put another way, the decision was "unjust because of a serious procedural or other irregularity in the proceedings in the lower court" per CPR 52.21.(3)(b).

62. One knows not whether Mr Shaw is correct in his assertion that the outcome will ultimately be the same, but in the circumstances of this case, it matters not. This mother was denied the very protection which has been put in place to ensure that she, as a woman with learning difficulties, has a fair trial. The stakes could not be higher; she faces the permanent loss of her two infant children. In my judgment, the fact that the mother will have the assistance she requires for the balance of the proceedings cannot make up for the fact that she was without that help in the crucial hearing, the findings from which will form the basis for all future welfare decision in respect of these two children."



Re S (Vulnerable Party: Fairness of Proceedings) [2022] EWCA Civ 8

Duty extends to all parties

38. These comprehensive provisions are of fundamental importance to the administration of family justice. As paragraph 1.3 of PD 3AA makes clear, the court's duty to identify any party or witness who is a vulnerable person arises not only under the express provisions in Part 3A of the FPR but also under the overriding objective provisions in Part 1. (It is notable that the equivalent, albeit more succinct, provisions subsequently inserted in the Civil Procedure Rules are specifically contained within the overriding objective provisions in Part 1 of those rules supplemented by Practice Direction 1A.) The duty is to identify such persons "at the earliest possible stage", an obligation reinforced in proceedings under Part IV of the Children Act by the requirement in the Public Law Outline in Practice Direction 12A to consider the need for directions as to special measures and intermediaries at the initial case management hearing.
39. It is equally clear that the duty to identify any party or witness who is a vulnerable person, and to assist the court to ensure that each party or witness can participate in proceedings without the quality of their evidence being diminished, extends to all parties to the proceedings and their representatives. It will almost invariably be one of the parties or their representatives, rather than the court, who first identifies that a party or witness is or may be vulnerable. We consider that good practice requires the parties' representatives actively to address the question of whether a party is vulnerable at the outset of care proceedings. Indeed, as social workers will as a matter of course be looking for vulnerabilities in families as part of their practice, it is to be hoped that this issue will be identified before care proceedings are started. We recognise, however, that it is often not easy to identify vulnerabilities and that professionals dealing with urgent and difficult situations in families will have to contend with a large number of issues. For that reason, we consider that, to comply with the obligation under rule 3A.9, the judge conducting the case management hearing at the start of care proceedings should as a matter of course investigate whether there are, or may be, issues engaging Part 3A of the rules and that the parties' advocates should as far as practicable be in a position to respond. Furthermore, rule 3A.9 stipulates that the court's duty continues to the end of the proceedings. There will therefore be other points at which the court may have to address the issue – for example, where another party is joined to the proceedings.



A Local Authority v A Mother & Others [2022] EWHC 2793 (Fam)

- Application to re-open FF hearing where prior vulnerable party assessment indicated Ground Rules

which are subsequently shown to be inapt to provide a fair hearing/departure from Ground Rules during evidence

– whether case management decision should be appealed? What if the problems are not clear until evidence is being given? Relevance of post-decision evidence including transcripts.

53. The decision of HHJ Cove was fairly and squarely on the issue of whether Ms Smith's intermediary report demonstrated the fact-finding hearing was procedurally unfair. No transcript of the decision was available, only the order. It does not appear that that decision was the subject of any appeal, and so the current application is in essence in part an attempt to re-litigate an issue already determined with only limited further material different to that which was considered by HHJ Cove. The heart of the additional argument is that the transcript suggests the mother did not understand aspects of the questioning including the concept of the pool of perpetrators or the local authority case that if it was not the father it was her, that inadequate breaks were implemented in her evidence and during the evidence of others. Although Mr Feehan may be right that technically the court retains an unlimited discretion to reconsider applications which have already been made and determined, the circumstances in which the court will do so are limited and usually involve a material change in circumstances or fresh evidence which calls into question the reliability of the original decision. It is not open to the mother simply to re-argue the application based on the intermediary assessment. However, whether the transcripts create a different situation I shall consider.



‘A Mother’ cont.

56. It is clear then that the afternoon session does not seem to have complied with the breaks Ground Rule and the impression from this session is of the quality of the mother's evidence deteriorating over this session to some degree. I have considered whether this apparent failure to comply amounts to a sufficient departure from the Ground Rules on its own to warrant a conclusion that the mother's ability to participate fairly and appropriately was compromised to a degree that justifies reaching the conclusion that the non-compliance amounted to a procedural irregularity then lead to an unjust result or in alternative terms whether the non-compliance rendered the hearing of the mother's evidence materially unfair. **On a fairly fine balance I do not think that this alone did.** However, together with the concerns over the lack of compliance with the Ground Rules about breaks in relation to the medical evidence, in particular Professor Stivaros and Mr Richards and Mr Morrison (see below) I think the **overall combined effect in relation to the mother was that there was non-compliance with the identified Ground Rules which was material, and which thus affected the overall fairness of the hearing. Thus, I accept that the evidence from the transcript demonstrates sufficient additional evidence which shows that the Ground Rules identified by HHJ Backhouse were not implemented sufficiently in respect of the mother and warrant a conclusion that they alone demonstrate that the hearing was unfair to the mother.** It is a relatively fine balance as the breaks alone form only part of the Ground Rules and in other respects, in the use of simple language and questions, the impression from the transcripts is one of in the main compliance. But I am conscious that the mother's cognitive assessment showed a lower level of functioning than the father's and that the intermediary report of Ms Smith contains a detailed set of recommendations based on her assessment to promote fair participation and having regard to this non-compliance with the Ground Rules clearly creates a real risk of adverse impact. **The judgment of HHJ Backhouse identifies the mother as a more credible witness but not one whose evidence is sufficiently reliable to allow the judge to say, on balance, she was probably not a perpetrator. A material change in the mother's credibility arising from fuller compliance with Ground Rules clearly might make a significant difference to her.**



GK v PR [2021] EWFC Civ 106

- M appealed FF decision dismissing wide range of allegations of domestic abuse made against F. Appeal allowed
- [32] Peel J was troubled by, *inter alia*, the fact no ground rules hearing took place before FF where vulnerability issues would have been raised, no reference to Part 3A in judgment, M's medical condition exacerbated by stress which resurfaced following stress of giving evidence, no though given to different process of XX, F was able to see M throughout her evidence, M was able to see F through camera as sat behind counsel (arrangements "not appropriate")
 - "The anxiety for a woman giving evidence in court against a former partner, alleging abusive conduct, and in the context of seeking to (as she sees it) protect her child, cannot be underestimated." [32(iv)]

33. Further, in my judgment the judge nowhere considers the impact of GK's vulnerability on her giving evidence. He refers to her oral evidence appearing pre-prepared and "dissociated" without considering whether or to what extent trauma induced vulnerability may have caused or contributed to her presentation. Again, in my judgment the subsequent GP letter casts more light on this for me. If GK was indeed subject to extreme stress, caused by revisiting traumatic episodes, that may in part have contributed to what the judge perceived as the unconvincing way in which she gave her evidence.

...

44. I am satisfied that the judge's findings cannot stand. The failure to consider Part 3A, GK's vulnerability, and appropriate special measures severely undermines the judgment, particularly in the light of the subsequent GP letter. I cannot be confident that GK was able to give evidence in the best possible way.



Re S (Vulnerable Parent: Intermediary) [2020] EWCA Civ 763

- Appeal against decision that intermediary assessment was not necessary or proportionate.
- Appeal allowed:
 - Court had to adapt to the needs of lay parties – where party/witness has an LD, that adaptation had to be sufficient to ensure they were genuinely able to participate effectively in the hearing, both in and out of the witness box.
 - Use of remote technology had additional implications for parties and witnesses with LD.
 - Removed many of the visual cues that were so valuable to individuals with a cognitive impairment.
 - Had been necessary to step back from the detail of the FPR and look carefully at the likely experience of M as a vulnerable parent (complex format of hearing, prospect of removal of baby hanging over her).
 - Intermediary could assist to negotiate the process of being questioned remotely and participate in hearing to the fullest possible extent.



J v K and another (EHRC intervening) [2019] EWCA Civ 5

- Appeal from the EAT
- Dicta of Underhill LJ, [32] onwards. At [39] offers guidance:
- (1) The starting-point in a case where an applicant claims that they failed to institute their appeal in time because of mental ill-health must be to decide whether the available evidence shows that he or she was indeed suffering from mental ill-health at the time in question. Such a conclusion cannot usually be safely reached simply on their say-so and will require independent support of some kind. That will preferably be in the form of a medical report directly addressing the question; but in a particular case it may be sufficiently established by less direct forms of evidence, e.g. that the applicant was receiving treatment at the appropriate time, or medical reports produced for other purposes.
- (2) If that question is answered in the applicant's favour the next question is whether the condition in question explains or excuses (possibly in combination with other good reasons) the failure to institute the appeal in time. Mental ill-health is of many different kinds and degrees, and the fact that a person is suffering from a particular condition – say, stress or anxiety – does not necessarily mean that their ability to take and implement the relevant decisions is seriously impaired. The EAT in such cases often takes into account evidence that the applicant was able to take other effective action and decisions during the relevant period. That is in principle entirely acceptable, and was indeed the basis on which the applicant failed in *O’Cathail* (though it should always be borne in mind that an ability to function effectively in some areas does not necessarily demonstrate an ability to take and implement a decision to appeal). Medical evidence specifically addressing whether the condition in question impaired the applicant's ability to take and implement a decision of the kind in question will of course be helpful, but it is not essential.^[3] It is important, so far as possible, to prevent applications for an extension themselves becoming elaborate forensic exercises, and the EAT is well capable of assessing questions of this kind on the basis of the available material.
- (3) If the Tribunal finds that the failure to institute the appeal in time was indeed the result (wholly or in substantial part) of the applicant's mental ill-health, justice will usually require the grant of an extension. But there may be particular cases, especially where the delay has been long, where it does not: although applicants suffering from mental ill-health must be given all reasonable accommodations, they are not the only party whose interests have to be considered.



Re M (A Child) (Fact Finding: Appeal) [2021] EWHC 3225 Fam

- Appeal following FF hearing as to allegations of rape and domestic abuse. (Judd J)

59. It does not appear from any of the orders that the question of participation directions was considered or determined by the court. The provision that the mother and father should attend court on different days to give evidence appears from the wording to have been made in order to meet the restrictions on too many parties being in one room as a result of Covid.

62. The mother was fully represented throughout the proceedings, but the obligation to consider vulnerability is upon the court. I entirely accept Mr. Tyler's submission that counsel for the mother (and possibly the father too) would be expected to remind the judge(s) of this, and that (as privilege has not been waived) we cannot know whether or not there was a conscious decision not to ask for special measures. These points do not, however, relieve the court of the responsibility it has been given under the rules. Whilst I also take note of the dicta of May LJ in *Jones v MBNA Bank* [2000] EWCA Civ 514, as cited to me, there is a fundamental difference between the situation there and this one.

66. It must be clear from the matters I have set out above that this was a case which cried out for participation directions and a ground rules hearing, not just for the sake of the mother, but for the integrity of the court process itself. The purpose of the rules and Practice Direction is to avoid the quality of the evidence being diminished. Here, the need for directions went beyond the need to consider whether the parties should not come into physical contact in the court room or building. Matters, such as whether the mother should be visually shielded from the father as she gave her evidence, and what topics should be covered in cross examination, were highly relevant.



Re M cont

67. It was inevitable that the mother would have to answer very personal questions, but the questioning should have been restricted to what was necessary for a fair trial. An example of a line of questions which may not have been necessary is apparent from the start of her cross examination. She was taken to explicit material from her days six years earlier as a 'cam girl' to demonstrate she knew the meaning of some swear words. **There might have been a different way of achieving this goal.** At the start of the hearing there was a discussion about the possibility of playing some excerpts of the explicit videos to the parties in court if the need arose although this did not actually happen. It does not need much imagination to think that this might have had a deleterious effect on someone who was a victim of intimidation and/or abuse. I say all this to illustrate that it is not an academic point but wish to be absolutely clear that counsel is not to be criticised. Cross-examining on such matters is difficult yet very important, and counsel benefit from a ground rules hearing as well.

72. I should make it clear here that whilst there is a continuing obligation upon the court to apply the rules, this judge came to the case fresh at the fact finding hearing. The matter was not raised by anyone including counsel at earlier hearings before different judges. **What happened here is a stark reminder to us all that these matters need to be addressed to avoid the risk that the integrity of the trial will be undermined.**



D and E (Parent with Autism) [2020] EWFC B18

118. In the judgement of the Court, the diagnosis of Autism Spectrum Disorder was highly significant. Dr Suleman identified that many of the features of the mother's presentation that gave rise to concerns on the part of the Local Authority identified in the Local Authority parenting assessment, including a lack of eye contact, a lack of recognition of emotional cues and social cues, giving short answers, having a blank expression and having rigid routines, were all features of Autism Spectrum Disorder. The Court accepted the powerful submission made by Miss Geddes on behalf of the mother, that the mother is entitled to appropriate and targeted support to assist and support her in parenting her children, having regard to the diagnosis of Autism Spectrum Disorder.

119. Regrettably, it cannot be said that adjustments of the type recommended by the professionals were adopted consistently during the assessments of the mother undertaken at the residential assessment centre. **Further, the Local Authority in its dealings with the mother did not adopt special measures particular to her needs.** Whilst it had been highlighted some time ago that the mother may have signs of autism, the mother was not formally diagnosed until February 2019. By that time, the mother had already undertaken a lengthy residential assessment and was part way through her community-based assessment.

125. The Court attempted during the final hearing to adopt the reasonable adjustments highlighted in the opening paragraphs of this judgment and having regard also to the specific guidance provided by the intermediary relating to the mother, which set out a focused list of adjustments specific to her needs. It was unfortunate, however, that prior to the final hearing, **this case did not benefit from judicial continuity**, the parties appearing before four different tribunals since the application was issued. The well-established principle of good practice, that case management of a complex case should be conducted by one Judge, was not achieved. In the family jurisdiction in particular, judicial continuity serves to ensure the identification of a Judge responsible for the conduct of all case management and interim hearings and the early identification of the Judge to conduct the final hearing. The many benefits to be achieved through allocation to a single Judge are well rehearsed. The relevant issues in the case are easier to identify. Only one Judge need read the case papers. Firmer judicial control can be exercised over a case and case management is more consistent with interim applications being heard by the same Judge. Experience has also shown that Judges to whom cases are allocated are able to accept a greater responsibility for the progress of cases and urgent applications heard in a timely manner. The aspiration of judicial continuity was ever more important in this case, having regard to general guidance that autistic people may experience difficulties if the same Judge is not involved throughout the proceedings and having regard to the specific needs of the mother identified by the professionals, including the need to limit the numbers of people working with the mother to as few as possible.



D & E cont.

130. In the judgement of the Court, the absence of suitable, targeted and attuned assessment, having regard to the mother's Autism Spectrum Disorder meant that the Court could not attach sufficient weight to the community-based assessment or indeed to the social worker's parenting assessment, such that the Court could not be confident that final decisions could be made in respect of the children D and E without further evidence, necessary to assist the Court in concluding the proceedings justly. The Court did not accept the suggestion of the social worker and Children's Guardian that, as the mother's Autism Spectrum Disorder was diagnosed as being 'mild,' the impact of her autism on the assessment process should be disregarded. Whilst the Court accepted that the mother's Autism Spectrum Disorder is only a part of her psychological profile, in the judgement of the Court, it was an integral part of her psychological make-up that could not be ignored or its impact minimised.
131. In the judgement of the Court, there was patently insufficient reliable evidence to conclude that the welfare of D or E demanded separation from their mother. Further information was necessary to support and assess the mother's parenting and her ability to implement and maintain advice in respect of her parenting on a consistent and sustained basis. The mother required targeted assistance to overcome the deficiencies in the existing assessments. That evidence should be obtained through an Independent Social Worker with specialism in Autism Spectrum Disorder, in accordance with the mother's Part 25 application made during the Final Hearing.



Macdougall v KE and others [2022] EWHC 2479

- Adjournment for intermediary refused - context specific recommendations needed
- Father involved in separate criminal proceedings and an intermediary appointed in the criminal trial which had been adjourned.
- Father had LD and was on the autistic spectrum.
- Lieven J considered intermediary's recommendations "*are matters that a judge, properly informed and acting appropriately, would ensure in a case such as Mr MacDougall's in any event*" [10].
 - "*In my view, trying to look at this case as a whole, I do not accept the need for Mr MacDougall to have an intermediary in the family proceedings. Family proceedings are not the same as a criminal trial, both in terms of the formality of the proceedings, the nature of the questioning and the degree to which it is appropriate for the judge to intervene to ensure that questioning is done on a level, and in a way that may be, to quote from another document, "Not an Old Bailey type cross-examination".*" [14]



Strategies for communication



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Vulnerability

- Duty of all advocates to identify vulnerability at and early stage in the proceedings
- No definition of Vulnerability
- Need to look beyond ASD ADHD LD
- Focus on experience of witness and barriers to communication – not diagnoses
- Communicourt reports
- Compiling, using and updating 1-page person-centred portable communication guides



The Advocates Toolkits

- <https://www.theadvocatesgateway.org/toolkits-1-1-1>



Preamble to every Toolkit

- The Advocate's Gateway toolkits aim to support the identification of vulnerability in witnesses and defendants and the making of reasonable adjustments so that the justice system is fair.
- Effective communication is essential in the legal process.
- **'Advocates must adapt to the witness, not the other way round.'** Lady Justice Hallett in *R v Lubemba; R v JP* [2014] EWCA Crim 2064, para 45.
- The handling and questioning of vulnerable witnesses and defendants is a specialist skill. Advocates must ensure that they are suitably trained and that they adhere to their professional conduct rules.



Communication needs

The most significant factor in effective communication with a vulnerable person or somebody with communication needs is the questioner's ability to adopt an appropriate manner and tailor questions to the needs and abilities of the individual (Agnew et al, 2006; Bull, 2010; Powell et al, 2013), enabling the person to understand questions and give answers that he or she believes to be correct.

No two people will have the same profile of communication strengths and weaknesses.

Obtaining a full picture of the individual's communication capabilities is essential and an intermediary can help with this,

Always consider assessment of a vulnerable witness by an intermediary (**Youth Justice and Criminal Evidence Act 1999**, section 29) if the person is unlikely to be able to recognise when they do not understand something, or tell you that they have not understood, or has some other communication difficulty.



Duty to consider vulnerability

- According to Lord Reed, in *Osborn v Parole Board* [2013] UKSC 61: '[Justice] is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions.' (para 68) And fairness 'depends on the circumstances' and it is 'impossible to lay down rules of universal application' (para 80).
- 1.2 Vulnerability is not the same as unreliability. With the necessary support, most people including those who are deemed vulnerable, can give reliable evidence.
- 1.3 Advocates and judges should be proactive in identifying the need for an assessment of potential vulnerability and responding to it. Vulnerabilities in a witness or a defendant may be identified by a range of professionals and practitioners, including, for example, police officers, liaison and diversion services, instructing solicitors, court staff and victim support. It should not, however, be assumed that a person's vulnerability will have been...



Vulnerability in family cases

- Toolkit 13
- Vulnerability should be identified at the earliest possible stage and information-sharing is key to achieving this.
- The Family Procedure (Amendment No. 3) Rules 2017 ('FPR') came into force on 27th November 2017. They are supplemented by Practice Direction ('PD') 3AA - Vulnerable Persons: Participation in Proceedings and Giving Evidence.



Identification of the vulnerable client

- Sometimes this will be obvious, as your client will have a diagnosis
- Advice from the law society in identifying vulnerable clients
- Targeted Toolkits
- Neurodivergence/ASD
- Learning disability
- “Hidden” neurodisability
- Co-morbid mental health issues/depression/PTSD?



Cloak of Competence

- **Term used by Dr Parsons in [Re N \(A Child\) \[2019\] EWCA Civ 1997](#); [2019] 4 WLR 154**
- Referred to by King LJ in her judgment Dr Parsons noted that a feature of the mother's presentation is that she initially presents as far more cognitively able than is the case. This is a phenomenon referred to as "the cloak of competence" and should, Dr Parsons says, not be seen as deception on her part, but as an adaptive skill developed by a person to help cope with daily life.
- Many clients will appear very competent especially if they are employed and appear to live a "normal" life (save for being involved in proceedings)
- Clients will not have the adaptive skills to negotiate proceedings
- May not recognise they do not understand or may be too embarrassed to let you know
- Risk factors which indicate vulnerability "may not be apparent and, even if they are, identification of vulnerability is poor. Even when identified, vulnerability is not always acted upon (Gudjonsson 2010; Young et al 2013)."



Cloak of Competence (cont'd)

- **‘Self-reporting’ is often unreliable as individuals may choose not to disclose for fear of discrimination, ridicule or a more punitive response.**
- An advocate who suspects a witness or defendant might be vulnerable should consider asking questions of that person, asking appropriate others to make enquiries and/or seek expert advice.



Prevalence of learning difficulties

- Studies have reported that a high number of parents in care proceedings have learning disabilities
- *Masson et al 2008* Reported 12.5%
- *Booth 2004* Reported 1/6 of cases
- Old research and likely to be outdated and we can suppose number is higher
- The evidence indicates parents with learning disabilities are often unsupported in involvement with CSC and courts
- *Re L (Care Threshold Criteria) [2007] 1FLR 2050* “society must be willing to tolerate very diverse standards of parenting including the eccentric, the barely adequate and the inconsistent ... it is not the provenance of the state to spare children all the consequences of defective parenting”



Communication needs and autism

NB – no two people with ASD will have the same communication needs

Behaviour and presentation

People with autism may display unusual behaviours that may reflect their own specific interests, anxiety, or difficulties about knowing what is socially appropriate in given situations. These behaviours are at risk of being misconstrued by the courts and professionals.

For example, a person with autism may;

- avoid eye contact;
- change the topic of conversation to a ‘preferred topic’;
- laugh at inappropriate moments;
- have an odd, monotone or pedantic manner of speaking (Klin et al 2005; Foster 2015);
- have difficulty seeing things from other people’s perspectives and therefore seem to lack empathy (e.g. Baron-Cohen 2003; Gillberg 1992);
- become verbally abusive or physically lash out because of difficulties keeping calm in highly stressful situations. This may be indicative of a ‘meltdown’, which is a temporary loss of behavioural control in response to an overwhelming situation (see National Autistic Society (NAS) ‘Meltdowns’). Meltdowns can take different forms, including screaming, crying, biting, or complete withdrawal.



Communication needs (ASD) (cont'd)

Many people with ASD will experience heightened anxiety when:

- In unfamiliar settings
- Communicating with unfamiliar people
- Changes to routine or plan of what is expected

- Difficulties with attention and listening:
 - Limited attention span

- Difficulties with spoken language:
 - A person with ASD may seem articulate but this can mask difficulties understanding spoken language
 - And have difficulties using language
 - May appear to read well but not fully understand (hyperlexia)



Neurodivergence – individualised communication approaches

- A considerable percentage of the population may have difficulty in reading, spelling and numeracy, or have weaknesses in information processing, communication skills and memory; A significant number of teenage boys or young men commonly display features of attention deficit (hyperactivity) disorder (ADHD).
- Specific language difficulties include specific language impairment, dyslexia, dyspraxia, dyscalculia and AD(H)D. Together, specific language difficulties are believed to affect at least 15% of the population and constitute the most common disability to be encountered in the criminal justice system.
- Co-morbid disorders consequent upon ACE and “the trauma brain” may compromise effective communication/participation
- Zoning out, triggers, repetitive answers “I don’t know”, dissociation, fight/flight



Neurodivergence – diagnoses/umbrella terms

- **Specific learning difficulties** consist of a family of related neurological conditions which occur independently of intelligence and involve weaknesses in information processing communication skills and memory. It is common for someone with a specific learning difficulty to have more than one, and/ or other conditions.
- **Specific language impairment** refers to difficulties with comprehension and/or expression (use) of spoken language.
- **Dyslexia** affects the way information is processed, stored and retrieved, with problems of memory, processing, organisation and sequencing, and getting dates, numbers and events in the right order.
- **Dyspraxia** impairs movement and co-ordination but can also involve problems with language, perception, thought and personal organisation.
- **Dyscalculia** causes difficulties concerning telling the time, time-keeping and understanding quantity, prices and money.
- **Attention deficit (hyperactivity) disorder** is a neuro-developmental disorder affecting the cognitive management system of the brain. It is typified by poor listening skills, distractibility and disorganisation.



Communication needs

The person may need additional support with:

- expressive communication – verbal fluency and precision in speech and word-finding;
- receptive communication – simplifying complex vocabulary, abstract concepts and legal terminology and long or complex questions;
- receptive language delay – the person may have difficulty with taking in information: delay between hearing something and understanding it and in working out how to respond;
- misunderstandings due to over-literal interpretation, use of pronouns and/or use of negatives.

The person may have dyssemic difficulties:

- expressive and receptive problems with body language – may not use body language conventionally or appropriately and may have difficulties understanding and interpreting the body language of others.
- modulating speech volume – can be over-loud (which may seem aggressive) or too quiet.

- modulating tone of voice – may be monotone, sound excessively enthusiastic or sarcastic.

6.3.6 The person may have sequencing, organisation and time management difficulties:

- problems with presenting a sequence of events in a logical, structured way;
- problems sequencing numbers and letters;
- problems with time management;
- difficulties estimating the passage of time.

7.3.7 The person may need support with reading.

- Some people with dyslexia experience visual stress when reading; text can appear distorted or blurred. Tinted paper is preferable with well-spaced plain print in font size 12 or above, non-justified (see British Dyslexia Association).



Communication needs with ADHD

- Inattention & Poor Focus
- Difficulty Concentrating
- Distracted Easily
- Struggling to Maintain Focus on a Specific Task
- Problems with Planning, Executing, and Completing Certain Tasks
- The Appearance of Not Listening when Being Spoken To
- Manages Some Tasks Better Than Others
- Difficulty Learning and Developing New Skills or Concepts
- Hyperactivity & Significant Difficulties Staying Still, Not Fidgeting
- Often Rotates Between Tasks and Activities
- Often Doing Multiple Things At Once
- Impulsive Behaviour
- Impatient and Has a Hard Time Taking Turns
- May appear loud / aggressive
- May respond inappropriately / blurt out what seems to be an inappropriate response

**Likely to also suffer with depression
anxiety and panic attacks**



Depression / Anxiety / PTSD

- Research suggests that those suffering from anxiety and depression are viewed as not requiring the same level of support or empathy
- ‘Snap out of it’ approach or
- ‘Take medication and it will all be better’
- Prone to stress reactions when their coping strategies break down
- Overwhelming feelings of guilt / shame
- Emotional distress can fluctuate
- Be aware of the impact of trauma on communication
- PTSD - avoid triggers
- Symptoms of hyper arousal, hyper vigilance, startled response, sleep disturbance, outburst of fear, panic or aggression
- High anxiety may trigger episodes of dissociation



What to look for

- Does your client need assistance reading / filling in official forms?
- Do they have dyslexia (more likely to admit to this than have a LD)?
- How are they in terms of keeping appointments, do they need reminders?
- On meeting clients, do they appear to understand what is going on/understand the seriousness of allegations ?
- Do they seem hostile to you?
- CAF assessment or SWET referencing any of the following might be indicators:
 - Distractibility / not listening
 - Scrolling on phone
 - Appearing to fall asleep in meetings / disinterest in meetings
 - Walking away from S/w meetings / not attending meetings
 - Repeatedly failing to follow practical advice
 - Loud aggressive communication
 - Is there a history of CSC involvement?



So far...

**it seems almost every client may be vulnerable
and or suffering from a disability**

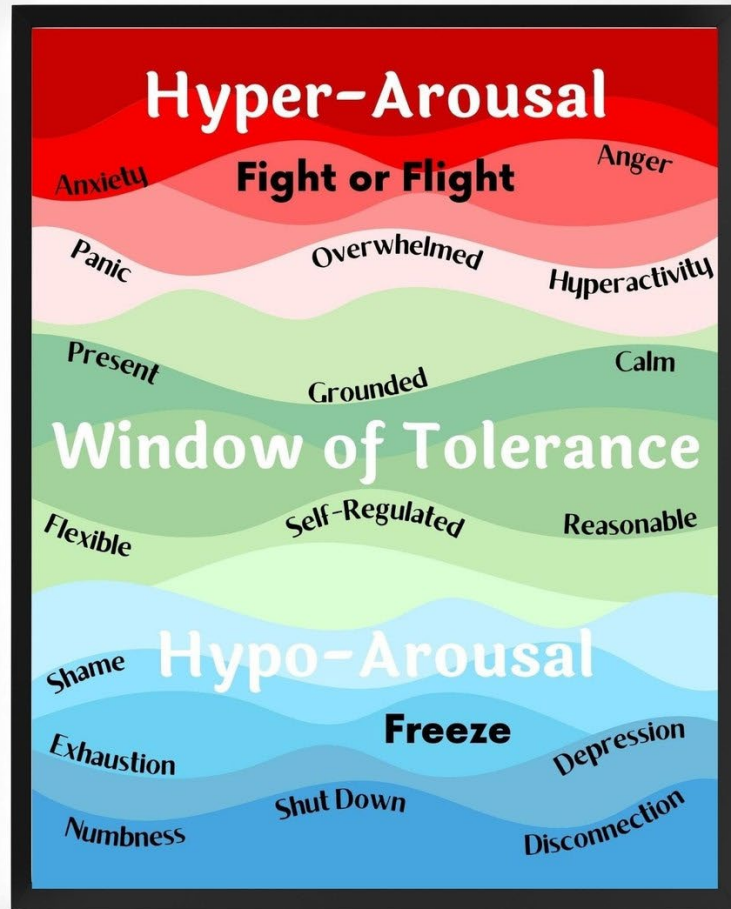


The impact of stress on communication

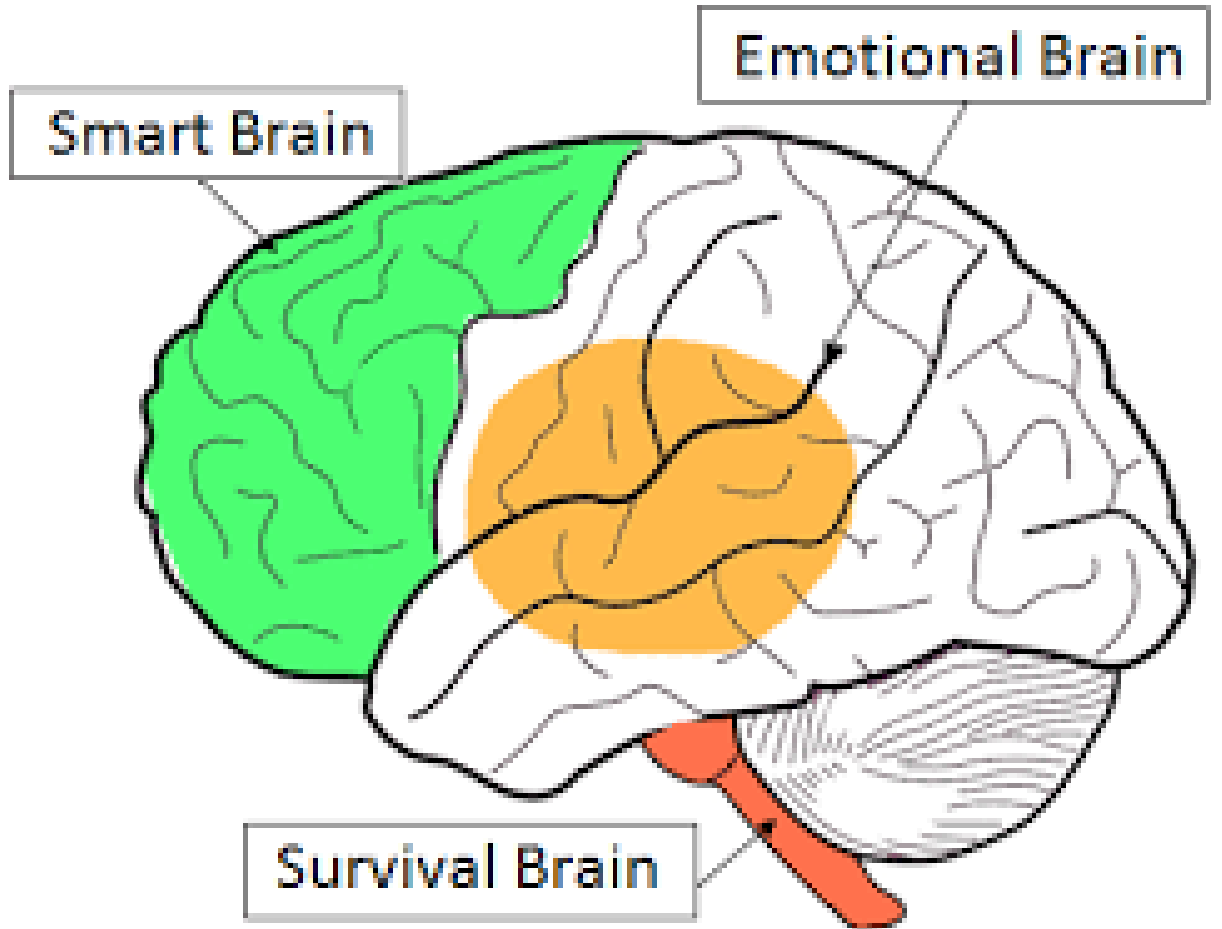
- **Be aware of the impact of stress on communication because many people with a specific learning difficulty**
- Witnesses with Mental health difficulties and neurodevelopmental difficulties are likely to have low confidence and self-esteem, rendering them prone to stress reactions where their coping strategies break down and their impairments become even more pronounced. Frustration and stress are heightened by poor communication, not knowing what is going to happen, and delays. Responses may include feelings of panic and mental overload, leading to total shutdown or the urge to provide any answer at all in order to bring questioning to an end.
 - (Toolkit 5 4.25)



The Window of Tolerance



The brain and coping strategies



Dan Siegel's hand model of the brain

- Warning, slightly irritating American psychiatrist
- But...
 - explains why it's so hard for any of us to think/react rationally when we're triggered. It's not specifically about neuro-diverse people or those with mental health difficulties, but they will tend to be more triggered by stressful situations. It's helpful in conjunction with thinking about the Window Of Tolerance.



What happens in Survival Mode

- Freeze mode
- Flight mode
- Fight mode
- Collapse or submit mode



FREEZE MODE

What I look like in Freeze mode

- Bored
- Distracted
- Not listening
- Appearing zoned out
- Looking around scanning the room



What I am aware of in Freeze mode

- My heart is beating faster
- My breathing is faster
- My brain is slowing down
- Background noises (I can hear what is around me without focusing)
- The tone of voices rather than words, listening for threats of danger
- I'm under attack
- Terrified
- I need to get ready to protect myself
- Body language cues looking for where the attack may come from
- My immediate surroundings and where the danger or escape route is



How my body feels in Freeze mode

- Under attack
- Ready to fight to defend myself
- Very scared
- My pulse rate is going up
- My muscles are tensing, my hands might clench into fists
- Some sounds are louder some more distant, I can't focus on what is being said but I can hear information and where the threats could be from the tone of your voice



You can help me feel safe by

- Don't stand over me when I am struggling with a task
- Try not to get annoyed with me if I have forgotten what I was supposed to be doing
- Don't ask me question after question
- Give me time to regulate



FLIGHT MODE

What I look like in Flight

- Hyperactive, manic
- Aggressive: stiffening up or clenching fists
- Walking away, escaping, disappearing
- Threatening
- loud and noisy
- Disrespectful
- Anti-social, lonely, a loner
- Immature



What I am aware of in Flight

- Vigilant to what is around me as a threat to my survival
- Sudden (noises others might not hear)
- Overwhelmed, too much stimulation to cope
- Noise levels
- Tone of voice from anyone speaking
- Who might be a danger to me
- How far away I am from feeling safe
- I need to get out of here



What my body feels in Flight

- Terrified
- My heart is beating faster my pulse is going up my heart is racing
- My breathing is getting quicker, I am ready to run / walk out
- My muscles are tensing so I can fight my way past
- Nauseous
- Increased sweating



What is happening in my inner world

- I need to get out of here I'm in danger
- There are more of them than me I need to find somewhere safe
- I'm not important
- Alone
- I must not show how I feel
- I must not tell anyone how I feel



How you can help

- Allow me time out
- Recognise that you might not feel the meeting place is threatening, but I might see things you do not
- Understand large meetings full of professionals, some of whom I do not know, can be terrifying
- Accept I feel threatened
- Appreciate if I have forgotten something, I have not done this on purpose
- Give me time to regulate



FIGHT MODE

What I look like in Fight

- Argumentative and aggressive
- Unable to concentrate
- Unable to finish a task
- Unable to follow the rules
- Unable to get on with staff / professionals
- Confrontational
- Disrespectful
- Non attender
- Immature



What I am aware of in fight mode

- Multiple threats of danger from all around me, I need to escape
- If I hit out first, I might survive
- I need to escape
- I don't trust anyone
- You don't listen so I will say what you want me to just to make you go away
- You don't really want to help me
- You don't really care



What my body feels in Fight

- Tense, ready for action
- Over alert, my hearting is beating so loud I can hear it
- Nauseous
- Terrified
- Faint / dizzy
- Overwhelmed
- I'm alone, no-one understands
- I need to cry / scream / laugh hysterically



What is happening in my inner world

- I wish I could make this work
- I want to go somewhere it is safe
- I wish you would notice how scary this all is
- I wish I had someone to talk to / who understood



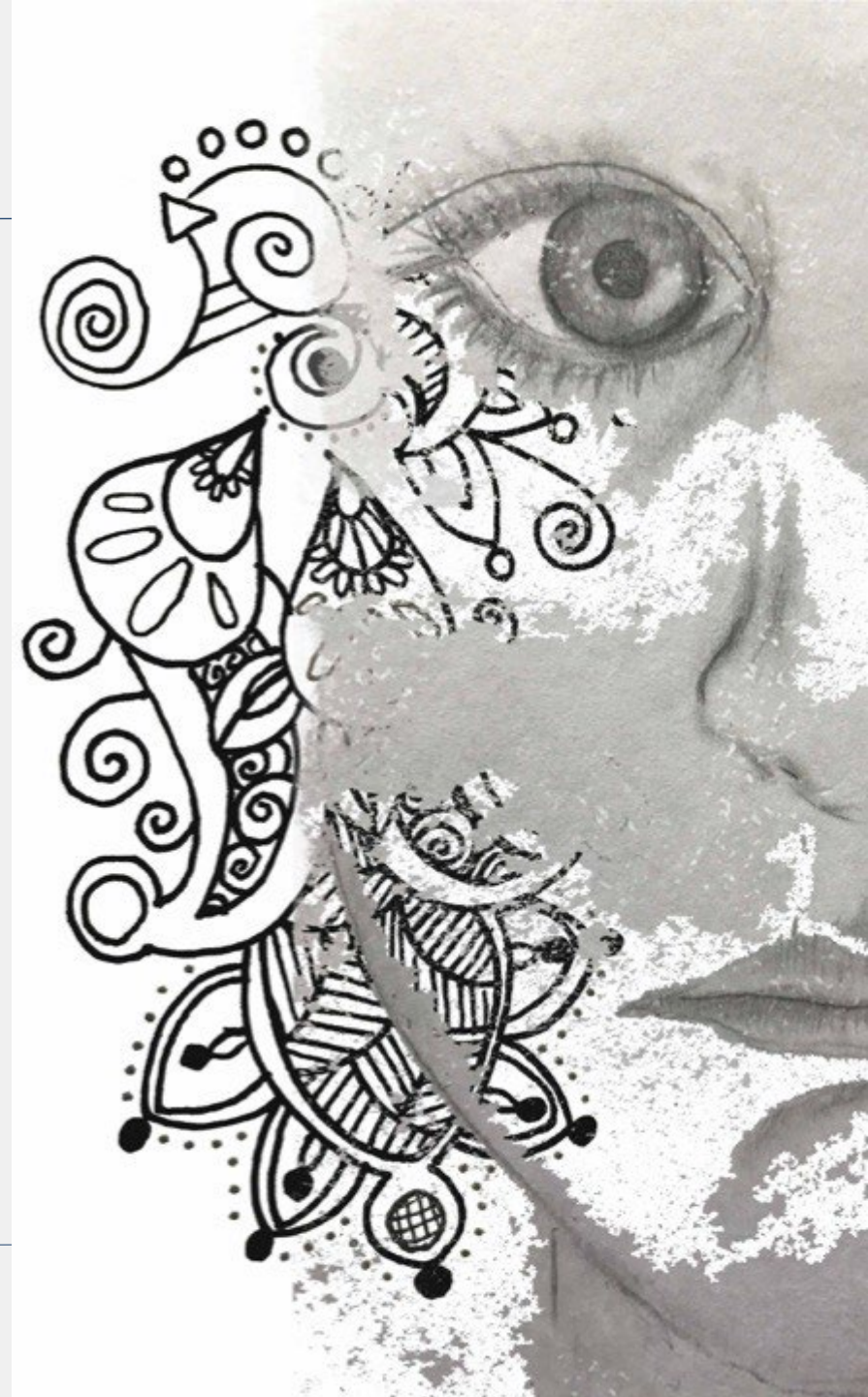
You can make feel safe by

- Understanding I may not feel safe speaking to some professionals
- Understand that sometimes I need extra time
- Understand that I can't focus in this state
- Let me have somewhere safe to go to calm down
- Give me time to regulate
- Listen and accept that I feel and see things differently, do not trivialize
- Understand this is scary
- Tell me about changes before they happen
- Accept I might not know why I behaved in a certain way or I might not remember



Collapse / submit mode

- Unhappy
- Withdrawn
- Anxious
- Head down
- Fidgety but not disruptive
- Not asking questions
- Yes no answers
- Quiet / passive



What I am aware of in Submit

- I am exhausted
- I need to put on a brave face
- If I do what you want / agree with you I will be left alone
- I feel dead inside



What is happening in my inner world

- Self harm helps me to feel something
- Drinking alcohol / using drugs helps me feel happy
- I am worthless
- It is not going to get better so I might as well give up
- I am dead inside



What my body feels in submit

- Exhausted
- Depressed
- Anxious
- Worthless
- Guilty
- Like crying or screaming
- Unable to sleep
- Unable to relax or enjoy anything
- Unable to care / feel



You can help me by

- Listen to me
- See me
- Recognise I am hurting inside
- Recognise that I will say whatever I think you want me to say
- Give me time to regulate



Why have we included all of this?

To help establish a roadmap to help all understand how our vulnerable client may feel in the following situations

- CP LAC /CIN meetings
- Social work visits / professional visits when asked many questions
- Parenting assessments
- FSW interventions
- Court hearings
- Meeting solicitor / barrister



What can we do as professionals to help

- Take time to listen to learn about your client and what they want
- Do not immediately focus on the criticisms
- Think about the positives and how you can help
- Ask how they experience certain situations / professionals
- Try to adapt to fit the client's needs
- Think about preparing a one page profile



Benefits of a One page profile

- This is not a statement of evidence
- A short hopefully one page document setting out key information to be given to all professionals involved
- Avoids the repetition of information to each professional as this can be re-traumatising and triggering
- Sets out what is important to your client and what they want to achieve
- Summarises the vulnerability and how this may look
- Explains behaviour that may be misunderstood
- Sets out how professionals can help a person self regulate



How to get the best out of your intermediary

- And why we need them
- We know in theory how to poach an egg but how many of us actually do it?
- The barrister / solicitor cannot be fully alert to communication difficulties at the same time as undertaking advocacy



Helpful documents to accompany clients at all times

- Tourettes passport
- NAS passport
- Mencap passport
- Available to all professionals, lawyers, SWs, court staff
- Confidentiality issues, best interests of client and consents



The PLO

- Important to identify vulnerability at this stage to ensure in so far as is possible that appropriate assessments are undertaken
- Remind the LA of its obligations under the Care Act s64
- Importance of having independent advocacy
- Use health passports /one page profiles



Finally

- “If we value our children, we should cherish the parents”

John Bowlby



Thank you

020 7993 7600

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Neurodivergent Court Users & Giving Evidence

Rebecca Wilkinson

Communicourt
communication matters in the courts

About Intermediaries

- **Our role:** facilitate communication
- **When:** during any and all stages of proceedings

- **Our process:**

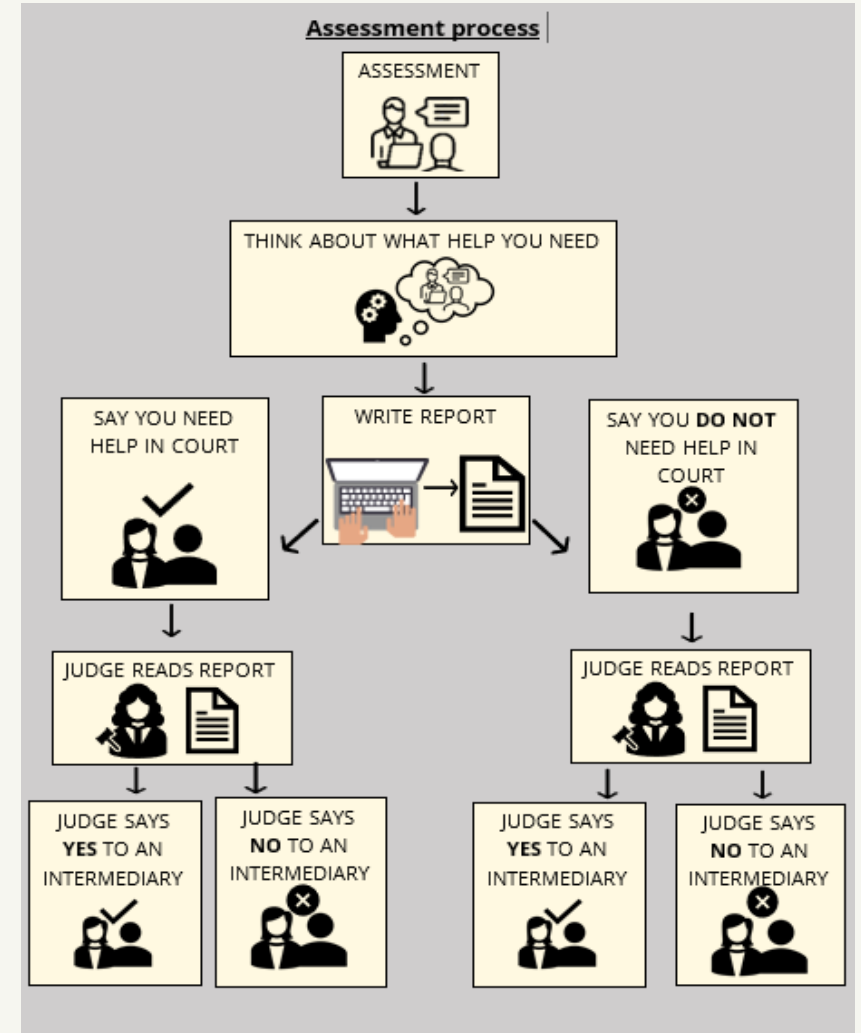
Assess



Identify strategies



Make recommendations



Important to note

- Intermediaries are not appointed **because** someone is neurodivergent.
- We are appointed to assist with **communication difficulties**.
- **No two** neurodivergent court users **are the same**.
- Some strategies assist for **more than one difficulty**.

Things to be aware of

ATTENTION

**EMOTIONAL
REGULATION**

EXPRESSION

PRESENTATION

Attention

- Attention and concentration difficulties are common.
- Serious consequences if this is misinterpreted.
- Cannot answer reliably if they are not able to pay appropriate attention.
- Possible strategies:
 - Attention aids
 - Provide topic lists to refer to
 - Minimise distractions
 - Regular breaks
 - Ask short and specific questions

Emotional Regulation

- Emotional regulation can be very difficult.
- Emotionally heightened states make it harder to respond reliably.
- Meltdowns / shutdowns can be common for autistic people.

This may look like:

Anger upset freeze response

- Possible strategies:
 - Discuss **before** giving evidence
 - Breaks
 - Provide topic lists
 - Named person present

Expression

- Expressive difficulties are common but varied.
 - ADHD – may interrupt or flit between topics
 - Autistic – may have difficulty providing relevant amounts of information
 - Dyslexia – may have difficulty saying their intended sentence.
- Most of my work to assist with expression during evidence happens before they start giving evidence.
- Possible strategies:
 - Explain the process
 - Provide topic lists
 - Ask prompt questions
 - Remind them of the “rules”

Presentation

- Neurodivergent people may not engage in neurotypical behaviours.
- Accept and encourage behaviours/strategies that assist – be positive!
- Neurodivergent court users may find social behaviours hard to follow.
- Possible strategies:
 - Pool questions
 - Provide attention aids
 - Consider *where* they give evidence from
 - Use screens

Summary

- No two neurodivergent court users will be the same.
- Be adaptive.
- Strategies will vary.
- Find what works for your neurodivergent client.





Neurodivergence Webinar Series: Witness Handling

Sam Robinson KC

15 May 2024



GARDEN COURT CHAMBERS



 @gardencourtlaw

Overview

- Judicial expectations – How to make the most of the changing landscape.
- Preparing for cross examination – Intermediaries (not a burden but a benefit).
- Defendant as a witness – Preparing for evidence in chief.
- Defence intermediaries – Getting the most from them.
- Defendant as a witness – Adducing the underlying condition.



Judicial Expectations – A changing landscape for XX

R v Lubemba and Pooley [2014] EWCA Crim 2064

- *‘The advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources’*

Criminal Practice Direction 2023

- 6.1.8 Accommodating the needs of young and/or otherwise vulnerable people may require a radical departure from traditional cross-examination. The form and extent of appropriate cross-examination will vary from case to case. For adult non-vulnerable witnesses, an advocate is expected to 'put the case' so that the witness will have the opportunity of commenting upon it and/or answering it. When the witness is young or otherwise vulnerable, the court may dispense with the normal practice and impose restrictions on the advocate 'putting the case', particularly where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed or acquiescing to leading questions.



Case Management

- At PCMH, the judge may raise the question of an intermediary, even if counsel does not.
- An intermediary may be essential at trial, even if one has not been used in the ABE. I/V. Cross-examination at trial is a very different ordeal.
- An intermediary's report should contain advice on:
 - (i) The questions asked, and the language used.
 - (ii) The witness's understanding, ability to communicate and to recall events.
 - (iii) The witness's ability to concentrate and advice on breaks.
- A Ground Rules Hearing with the intermediary and both counsel to discuss the report, how to manage the trial, and the witness's evidence in the light of the report.



Case Management – Defendants

R v P [2022] EWCA Crim 1120

- Judge is entitled to start from the premise that the status quo remain, unless there is evidence to the contrary.
- It is for the defence evidence to support an application for SM.
- Issues should be raised at an early stage.

Procedure

- PTPH stage 2 includes orders requiring applications for special measures for either defendant or defence witness.
- CPR part 18 applies.
- Follow the rules!



Is the condition admissible – *R v BRM* [2022] EWCA 385

- *Para 20 - ‘In short, the judge decided that (a) the reports had failed to comply with Part 19 of the Criminal Procedure Rules, (b) that the psychiatric evidence could not be relevant to the issue of intent and (c) that, whilst that evidence might be relevant to the subjective element of the legal test for self-defence or defence of another, the psychiatric evidence, as served, did not address that issue’.*
- *Para 37 - ‘Insofar as he did have any appreciation of the evidence, he did not explain how that evidence could be related to the diagnosis of Asperger Syndrome’.*



Thank you

020 7993 7600

| info@gclaw.co.uk

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GARDEN COURT CHAMBERS



**The Intermediary
Cooperative**

Intermediaries Criminal Jurisdiction

Louise Engers, MSc., BSc., MRCSLT
Speech and Language Therapist
Registered Intermediary
HMCTS Appointed Intermediary

Integrity - Social Responsibility - Person Centred- Holistic- Excellence

Aims

- What is the role of the intermediary in the criminal jurisdiction?
- Misconceptions about the role
- A collaborative approach
- What can you expect from the intermediary at different stages?
- Questions from participants



The Role of the Intermediary

- Detailed communication assessment & report
- Recommendations:
 - To prepare for the trial
 - To participate in the trial
 - To give evidence
- Communication facilitation
- Improve quality of evidence: completeness, coherence, accuracy
- Advise on special measures and reasonable adaptations to ensure accessibility and fairness for people with vulnerabilities
- Meaningful participation



Misconceptions

- Protect the witness from difficult questions
- Stop the barrister from asking certain questions
- Provide support to the witness
- Only work within the courtroom
- Expensive & waste of money



Collaborative Working

- Impartiality and professional duty
- A good intermediary should enable a barrister to do their job
- Advice on question wording, structure and delivery
- Benefits of joint working early on
- Dynamic working relationship; a problem solving approach
- An underutilised resource



What to expect

Before the trial

Pre-trial preparation

Understanding of the evidence

Understanding plea options

Understanding possible sentencing

Pre-trial visit

Managing expectation

Trauma informed



What to expect

During the trial

Understanding of the legal process

Understanding of the evidence

Disagreeing with witnesses

Discussions with counsel



What to expect

Evidence Giving

Understanding

Expression

Regulation

Trauma informed

After the trial

Pre-sentencing report

Sentencing



Questions



**For further information,
or to make a referral,
get in touch today...**



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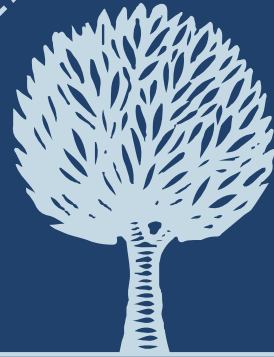


The Intermediary Cooperative

Communication for Justice

Integrity - Social Responsibility - Person Centred- Holistic- Excellence

GARDEN COURT



CHAMBERS



Vulnerable Witnesses in Public Inquiries

Thalia Maragh

15.5.2024



GARDEN COURT CHAMBERS



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Overview

- Legal Framework
- Vulnerable Witness Protocols – Manchester Arena Inquiry
- Use of Intermediaries – Infected Blood Inquiry
- Conclusions



Legal Framework

- The legal framework for Statutory Inquiries are contained in the Inquiries Act 2005 and Inquiry Rules 2006

The manner in which evidence is given and received by a public inquiry is determined by the Chair

s. 17

Evidence and procedure

- (1) Subject to any provision of this Act or of rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.
- (2)
- (3) In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost(whether to public funds or to witnesses or others).



Legal Framework

- **Section 41** includes the provision for the making of Rules which deal with among other issues matters relating to evidence.
- Rule 10 – deals with the questioning of witnesses

Although there is no specific provision in either the Inquiries Act or Rules for the support of vulnerable witness, neurodivergent witnesses giving evidence or the appointment of intermediaries, **s.17, 41** and Rule 10 have however been used to establish the procedure for supporting vulnerable witnesses as we will see in our examination of vulnerable witness protocols adopted in the Manchester Arena Inquiry.



Vulnerable Witness Protocols

As we know many core participants and witnesses who give evidence to public inquiries have suffered significant trauma which has in many cases been compounded by institutional deflection, defensiveness and obfuscation.

A number of recent inquiries have used vulnerable witness protocols to establish a supportive framework for vulnerable witnesses.



Manchester Arena Inquiry – A case study

Definition of vulnerability

4. A person shall be considered “vulnerable” for the purposes of this protocol if there is a significant risk that, by reason of one or more personal characteristics, he or she will:

a) experience added stress or other difficulty in being a witness or potential witness;

b) suffer a likely detrimental effect in the quality of any statement or evidence which they give;

c) require greater than normal support to ensure their participation; and/or

d) be at significant risk that by giving evidence he or she may suffer a worsening of their mental health or wellbeing.



Manchester Arena

5. The Inquiry does not intend to cause any harm or distress by using the term vulnerable to describe witnesses.

*As other courts have done, it is a term that the Inquiry has adopted to **capture a wide range of witnesses who may benefit from support and assistance to help them give evidence to the Inquiry** in the most effective manner and in the safest way possible, taking into account their personal characteristics.*



Manchester Arena

Personal characteristics

6. *These characteristics include, but are not limited to any of the following:*

a) age, in particular those under the age of 18;

*b) **a recognised mental disability or disorder;***

c) a specific learning difficulty or language impairment;

d) physical disability or disorder;

e) substantial fear or distress related to testifying about matters relevant to the Inquiry;

f) difficulties with communicating in spoken or written English;

g) difficulties with reading; and

h) any condition which, whilst not amounting to a recognised mental or physical disability is such as to affect significantly the ability of the individual to be a witness or a potential witness.



Manchester Arena

The Protocol included provisions for early identification of vulnerable witnesses

7. Anyone who may be a witness (or who is representing a witness) that is or may be vulnerable should notify the Solicitor the Inquiry as soon as possible. You should explain the following:

a) Details of the vulnerability

b) How the vulnerability may impact the witness' ability to give evidence.

c) Whether there are any special measures that may assist the individual to give the evidence.

d) If an independent health assessment or similar has been (or is expected to be) requested.

e) Any other relevant information.

f) Provide any medical or other information that will help to explain the particular vulnerability.



Manchester Arena

The identification of vulnerable witnesses

8. It is essential that anyone who is or may be vulnerable is identified as such at the earliest opportunity. All witnesses that are to be called to give oral evidence will be asked to notify the Solicitor to Inquiry of any matters that may impact their ability to give evidence. Any changes in an individual's vulnerabilities or needs should be communicated to the Solicitor to the Inquiry as soon as they are discovered.

The Determination of who is a vulnerable witness

9. The Chairman to the Inquiry will consider the information provided and determine whether any witness should be considered vulnerable within the meaning of this protocol



Manchester Arena

Special Measures to assist vulnerable witnesses

10. Where the Chair determines that a witness is vulnerable within the meaning of this protocol, he may direct that additional measures put in place to assist a witness to give evidence or to improve the quality of their evidence (Special Measures).

Before making any direction, the Chair shall, where possible, ascertain and take into consideration the views of the witness on the appropriateness and nature of the Special Measures and, if appropriate, the views of Core Participants.

The Chair's discretion to grant special measures including the appointment of intermediaries



Manchester Arena

Special Measures

11. The Chair has a wide discretion to make such directions, as he considers necessary. It may include, but is not limited to, one or more of the following measures:

a) The appointment of an intermediary: the Inquiry may appoint an intermediary to assess (and report upon) the additional needs of any witness, to assist with the making of a statement and/or to assist the individual when giving evidence.

b) The appointment of an interpreter.

c) The making of a recorded interview in place of (or, exceptionally, in addition to) a written statement:



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Special Measures Contd:

- i. where a witness is unable to make a witness statement in the normal way or the Chair considers it appropriate so to do, the account of an individual may be taken by way of a recorded interview;*
- ii. the interview shall be conducted in a manner approved by the Chair;*
- iii. the interview may be conducted by a member of the Inquiry Legal Team, although the Chair may approve another individual outside that team to conduct the interview;*
- iv. at any such interview, the witness or potential witness may be accompanied (in the interview room) by their solicitor (if they have one) and/or a friend, relative or other appropriate adult;*



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v. the recording of the interview should be audio-visual. Exceptionally, if such a method of recording is not reasonably practicable, the Chair may give permission for the recording to be solely audio.

d) Live link from a location outside the Inquiry room.

e) Screens to shield the witness from view.

f) Scheduling a clean start in order to avoid waiting

g) The support of a friend, relative or other appropriate adult (sitting with the witness as he/she gives evidence). Any such person shall play no part in the witness giving evidence unless directed to do so by the Chair.



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h) Regular breaks at prescribed times.

i) Providing evidence in large print.

j) Time limits for interviewing or questioning a witness.

k) Providing advance written notification of questions to a witness.

l) A preliminary hearing for establishing the appropriate boundaries for questioning and the advocates permitted to ask questions (a Ground Rules Hearing).

m) The opportunity to meet (whether in person or virtually) those advocates who are intending to ask questions



Questioning of vulnerable witnesses (Rule 10)

13. Advocates are reminded of the dictum of Lady Justice Hallett in R v Lubemba [2014] EWCA Crim 2064 at §45, which statement will inform the Inquiry's approach to managing the content and manner of any questions which are asked of vulnerable witnesses: "Advocates must adapt to the witness, not the other way round."



Infected Blood Inquiry

Intermediaries were appointed in the Infected blood inquiry in response to the report of those who, would have had difficulty providing witness statements or oral testimony to the Inquiry in the traditional way of giving evidence, because of the stigma attached to their experiences.

The intermediaries provided an initial report to the Inquiry in response to a Rule 9 request which documented the experiences of persons impacted without revealing their identities.

This was followed by the intermediaries evidence to the Inquiry.



Conclusion

Public Inquiries have increasingly recognised witnesses' and core participants' vulnerabilities and have established protocols for special measures which are aimed at minimising the distress that the experience of giving oral evidence may cause.

This approach arguable sets a foundation for strengthening support to neurodivergent witnesses and core participants in Public Inquiries.



Thank you

020 7993 7600

| info@gclaw.co.uk

| [@gardencourtlaw](https://www.instagram.com/gardencourtlaw)



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