Getting to Grips with Ground Rules Hearings: A Checklist for Judges, Advocates and Intermediaries to Promote the Fair Treatment of Vulnerable People in Court

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Ground Rules Hearings, a recent innovation, are now commonly used by judges to set the parameters for the fair treatment of vulnerable defendants and vulnerable witnesses. In 2013, for the first time, Ground Rules Hearings appeared in the Criminal Practice Direction and from April 2015 the Criminal Procedure Rules addressed the setting of ground rules. The authors examine the evolution of practice and law, including restrictions on "putting your case" to a vulnerable witness with an illustrative case example. A Ground Rules Hearing case study based on an actual hearing is set out and analysed. In conclusion the authors propose a checklist for Ground Rules Hearings to support the development of best practice.

Introduction

In 2013 Ground Rules Hearings (GRHs) were recognised by the Criminal Practice Direction (CPD)[1] as a key step in planning the proper questioning of a vulnerable[2] witness or defendant.[3] Many judges and advocates find them "invaluable"[4]; they

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[1] *Practice Direction (CA (Crim Div): Criminal Proceedings: General Matters)* [2013] EWCA Crim 1631; [2013] 1 W.L.R. 3164 (CPD) in particular at "General matters 3E: Ground rules Hearings to Plan the Questioning of a Vulnerable Witness or Defendant".

[2] For what is meant by "vulnerable" see *Identifying Vulnerability in Witness and Defendants*, *http://www.theadvocatesgateway.org/images/10identifyingvulnerabilityinwitnessesanddefendants100714.pdf* [Accessed March 23, 2015].

[3] P. Cooper, "Ticketing Talk Gets Serious", *Counsel*, November 11–12, 2014.

[4] E. Henderson, "Jewel in the Crown?", *Counsel*, November 10–12, 2014.

provide a mechanism by which the judge can set the parameters for the fair treatment of vulnerable witnesses and defendants:

> "Discussion of ground rules is required in all intermediary trials where they must be discussed between the judge or magistrates, advocates and intermediary before the witness gives evidence".[5]

In addition:

> "Discussion of ground rules is good practice, even if no intermediary is used, in all young witness cases and in other cases where a witness or defendant has communication needs. Discussion before the day of trial is preferable to give advocates time to adapt their questions to the witness's needs. It may be helpful for a trial practice note of boundaries to be created at the end of the discussion. The judge may use such a document in ensuring that the agreed ground rules are complied with."[6]

When should a GRH occur?

The Criminal Procedure Rules 2014 (CPR 2014) bolster the significance of GRHs; the overriding objective is that cases are "dealt with justly",[7] and

> "[f]acilitating the participation of any person includes giving directions for the appropriate treatment and questioning of a witness or the defendant, especially where the court directs that such questioning is to be conducted through an intermediary."[8]

Neither the CPR 2014 nor the CPD (updated for 2014 but with no amendments to the sections under discussion) is explicit about the use of a GRH prior to the trial of a vulnerable defendant, though it is implied.[9] It is in each of the authors' experience that a GRH frequently happens in practice at the start of a trial of a vulnerable defendant when for example the judge will determine the frequency and duration of breaks in proceedings. Some judges will also direct advocates to be mindful of how they question prosecution witnesses to enable the defendant to better understand and follow the trial. If the defendant subsequently elects to give evidence, a further GRH is required to agree the ground rules for his testimony.

The term "ground rules hearing" has been used in just four appellate judgments.[10] The first two, *Dixon* and *Re A (A Child) (Vulnerable Witness)*, predate by a few months the publication of the CPD 2013. The third and most significant is the 2014 Court of Appeal decision in *Lubemba* where two cases were heard together because they each raised the same issue

[5] CPD 2013 3E.2.
[6] CPD 2013 3E.3
[7] Criminal Procedure Rules 2014 (SI 2014/1610) (L. 26) r.1.1(1).
[8] Criminal Procedure Rules 2014 r.3.9(6), "Case preparation and progression".
[9] See for example CPD 2014 3F.6 and 3G Vunerable Defendants.
[10] *Dixon* [2013] EWCA Crim 465; [2014] 1 W.L.R. 525; [2014] Crim. L.R. 141 ("The absence of a ground rules hearing prior to trial with the judge did not make the trial unfair, although failure to take this step was regrettable", see [95]), *Re A (A Child) (Vulnerable Witness: Fact Finding)* [2013] EWHC 1694 (Fam); [2013] 2 F.L.R. 1473 (There was a ground rules hearing including the intermediary prior to the vulnerable young woman giving evidence, see [21] and [22]), *Lubemba; JP* [2014] EWCA Crim 2064; [2015] 1 Cr. App. R. 12 (p.137), conjoined appeals, see [43] and *R. v Jonas* [2015] EWCA Crim 526.

> "namely what measures a trial judge may legitimately take to protect a vulnerable witness, without impacting adversely on the right of an accused to a fair trial."[11]

Giving judgment, the Vice President said:

> "… judges are taught, in accordance with the Criminal Practice Directions, that it is best practice to hold hearings in advance of the trial to ensure the smooth running of the trial, to give any special measures directions and to set the ground rules for the treatment of a vulnerable witness. We would expect a ground rules hearing in every case involving a vulnerable witness, save in very exceptional circumstances. If there are any doubts on how to proceed, guidance should be sought from those who have the responsibility for looking after the witness and or an expert."[12]

The judgment does not elaborate on the "very exceptional circumstances" when a ground rules hearing would not be expected. If the witness is a 17 year old child (being under 18 and therefore "vulnerable" by definition) with no communication difficulties who neither requests nor is deemed in need of special measures or any adjustments to the typical process, could a GRH be dispensed with? The authors consider not since there is no such thing as "typical" cross-examination; best practice would therefore be to hold a GRH. One example of "very exceptional circumstances" occurred in late 2014.[13] The Court of Appeal in *R. v FA*,[14] without holding a face to face GRH, set ground rules in accordance with the recommendations in the intermediary's written report. The ground rules provided the framework for the appropriate questioning of a vulnerable witness (who had given evidence at the original trial) via live link to the Court of Appeal.

The evolution of the Ground Rules Hearings

The concept of the "Ground Rules Hearing" was devised during registered intermediary training. In 2003 the first author and her colleague[15] were engaged by the Home Office to design and deliver the first ever training course for Home Office registered intermediaries. Registered intermediaries (RIs) were a new and untested "special measure". The intermediary's function is set out in s.29 of the Youth Justice and Criminal Evidence Act 1999:

> "(1) A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court for the purposes of this section (an intermediary").
>
> (2) The function of an intermediary is to communicate—
>
> (a) to the witness, questions put to the witness, and
>
> (b) to any person asking such questions, the answers given by the witness in reply to them,

[11] *Lubemba; JP* [2014] EWCA Crim 2064; [2015] 1 Cr. App. R. 12 (p.137) at [1].
[12] *Lubemba*; *JP* [2014] EWCA Crim 2064; [2015] 1 Cr. App. R. 12 (p.137) at [42].
[13] Email correspondence between the first author and the intermediary in that case.
[14] *R. v FA* [2015] EWCA Crim 209.
[15] David Wurtzel, City University London.

> and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.
> …".

Legislation did not define how the questioning was to be conducted. Would the intermediary question the vulnerable witnesses in place of the advocate? Would the intermediary "translate" and relay the questions to the witness? A middle course was steered; intermediaries were trained to advise the advocates how to conduct the questioning and only intervene if they were concerned about miscommunication which would diminish the completeness, coherence or accuracy[16] of the witness's evidence.

Intermediaries were taught[17] that their interventions must be based on their assessment of the witness's communication needs and they should articulate "ground rules" for advocates so as to improve communication with the witness. These proposed ground rules, they were advised, should be set out in their intermediary report for court.[18]

In 2005 the first *Intermediary Procedural Guidance Manual*[19] noted that RIs should "request a meeting with CPS and advocates to discuss and agree ground rules for trial"[20] and to "establish a common understanding about how the intermediary will operate".[21] By 2006, RIs were reporting to the first author and her colleague[22] that despite meeting advocates for discussion, "ground rules" were not being adhered to during the trial. Therefore we advised RIs to be more assertive and to ask for what we called a "Ground Rules Hearing" with the trial judge and advocates. These GRHs moved from theory to practice when RIs began to insist on what was in effect a judge-advocate-intermediary meeting[23] where the judge would chair a discussion with the intermediary's report recommendations acting as a suggested agenda. In *Wills*[24] the Court of Appeal endorsed the good sense of there being a "practice note/trial protocol" recording the court's directions about how the advocate should question the vulnerable witness.

RIs were not asking judges to invoke new powers but rather to put the case management of vulnerable witness testimony on a clearer, more formal footing. As the Court of Appeal recognised in 2014 in *Lubemba*:

> "[T]he trial judge is responsible for controlling questioning and ensuring that vulnerable witnesses and defendants are enabled to give the best evidence

[16] Under the Youth Justice and Criminal Evidence Act 1999 s.16 , "references to the quality of a witness's evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose 'coherence' refers to a witness's ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively".

[17] By P. Cooper and D. Wurtzel on the first training course for registered intermediaries at City University London in 2004.

[18] For a detailed history of the first 10 years of the intermediary scheme in England and Wales see P. Cooper and D. Wurtzel, "Better the second time around? Department of Justice Registered Intermediaries Schemes and lessons from England and Wales" (2014) 65(1) *Northern Ireland Legal Quarterly* 39.

[19] The main authors of this procedural guidance were P. Cooper (the first author) and D. Wurtzel.

[20] Home Office, *Intermediary Procedural Guidance Manual* (2005), p.8, para 8.

[21] Home Office, *Intermediary Procedural Guidance Manual* (2005), p.8, para.14.

[22] These were anecdotal reports to the trainers, Cooper and Wurtzel.

[23] One intermediary asked for a Ground Rules Meeting and was promptly informed by the judge that "there are no meetings in my court".

[24] *Wills* [2011] EWCA Crim 1938; [2012] 1 Cr. App. R. 2 (p.16) at [22]. The Court of Appeal endorsed a recommendation of the Advocacy Training Council report, *Raising the Bar* (2011).

> they can. The judge has a duty to intervene, therefore, if an advocate's questioning is confusing or inappropriate."[25]

An effective GRH is a common sense approach to promoting best evidence and reducing the chance of the judge or intermediary having to intervene during questioning since the advocate has a duty to abide by the rulings made in the GRH.[26] Though GRHs only started taking place in 2006, the relevant case management powers already existed. In *Chaaban*[27] in 2003 the Court of Appeal said:

> "The trial judge has always been responsible for managing the trial. That is one of his most important functions. To perform it he has to be alert to the needs of everyone involved in the case. That obviously includes, but it is not limited to, the interests of the defendant. It extends to the prosecution, the complainant, to every witness (whichever side is to call the witness), to the jury, or if the jury has not been sworn, to jurors in waiting. Finally, the judge should not overlook the community's interest that justice should be done without unnecessary delay. A fair balance has to be struck between all these interests"(at [35]).

Two years later the Court of Appeal in *B*,[28] referring to *Chaaban*, confirmed that the proper "management of a trial involves the exercise of judgment and discretion"[29] on the part of the trial judge. The trial judge in *B* was justified in imposing "a time limit on the cross-examination of the complainant".[30] Those comments were not only echoed in *Lubemba* but a trial judge's *duty* was emphasised:

> "As we have already explained, a trial judge is not only entitled, he is duty bound to control the questioning of a witness. He is not obliged to allow a defence advocate to put their case. He is entitled to and should set reasonable time limits and to interrupt where he considers questioning is inappropriate."[31]

By 2009 Special Measures Guidance from the Professional Practice Committee of the Bar Council and guidance on the judges' intranet[32] advised that the judge should hold a hearing to discuss the recommendations in the intermediary's report and to set down the ground rules for the questioning of the witness. This advice had a limited effect. The first author's survey of RIs conducted in 2009 revealed that at that time only 42 per cent of RI trials had a Ground Rules Hearing. In 2010, the Criminal Procedure Rules Committee amended the special measures application form[33] to state:

> "'Ground rules' for questioning must be discussed between the court, the advocates and the intermediary before the witness gives evidence, to establish (a) how questions should be put to help the witness understand them, and (b)

[25] *Lubemba* [2014] EWCA Crim 2064; [2015] 1 Cr. App. R. 12 (p.137) at [44].
[26] *Farooqi* [2013] EWCA Crim 1649; [2014] 1 Cr. App. R. 8 (p.69).
[27] *Chaaban* [2003] EWCA Crim 1012; [2003] Crim. L.R. 658.
[28] *B* [2005] EWCA Crim 805; [2006] Crim. L.R. 54.
[29] *B* [2005] EWCA Crim 805; [2006] Crim. L.R. 54 at [16].
[30] *B* [2005] EWCA Crim 805; [2006] Crim. L.R. 54 at [16].
[31] *Lubemba* [2014] EWCA Crim 2064; [2015] 1 Cr. App. R. 12 (p.137) at [51].
[32] That is the Judicial Studies Board (JSB) intranet; the JSB has since become the Judicial College (JC).
[33] Application for a Special Measures Direction (Criminal Procedure Rules rr.29.3 and 29.10).

how the proposed intermediary will alert the court if the witness has not understood, or needs a break."[34]

In October 2013 the GRH came of age by virtue of s.3 in the Criminal Practice Direction[35] "General matters 3E: Ground rules Hearings to Plan the Questioning of a Vulnerable Witness or Defendant".

Ground rules in practice

The authors know of no published research about GRHs in cases without intermediaries; how and when judges or advocates instigate and conduct them in those cases has not been systematically studied. Research with intermediaries[36] has shown that though GRHs in intermediary cases have gradually become the norm, there is wide variation in judges' and advocates' approaches to the hearing. For example some judges hold the GRH in the courtroom and some judges hold them in their chambers.[37] The informality of a judge's chambers might promote more discussion, but the formality of a court and the recording of proceedings might better reflect the importance of compliance with ground rules and would better adhere to the principle of publicly administered justice.

There is variation in judicial views about where the intermediary should stand/sit during a GRH.[38] GRH discussions with the intermediary for a vulnerable defendant speaking from the dock, sometimes behind security glass trying hard to hear and be heard, are not unknown. When the GRH is in court, the witness box is often the most convenient place for the intermediary to be, albeit some advocates may be tempted to treat the intermediary as if they were a witness to be challenged. The intermediary is not a witness[39] and should not be cross-examined at the GRH let alone (when the intermediary is working with a defendant) cross-examined in a hostile manner in front of the probably already very anxious, vulnerable defendant.

The GRH and providing questions in writing

The ground rules in the Court of Appeal case included an order that cross-examination questions should be "provided to all parties" and to the registered intermediary in advance. A ground rule about reducing questions to writing so that they may be reviewed in advance[40] is a practice which appears also to be supported by the Court of Appeal in *Lubemba*:

[34] At F1.

[35] *Practice Direction (CA (Crim Div): Criminal Proceedings: General Matters)* [2013] EWCA Crim 1631.

[36] P. Cooper, *Tell Me What's Happening 2: Registered Intermediary Survey 2010* (2011), City University London, *http://www.city.ac.uk/_media/city-site/documents/law/courses/Tell-Me-Whats-Happening-2-RI-Survey-2010-FINAL-VERSION-14062011.pdf* [Accessed October 23, 2014]. P. Cooper (2012) *Tell Me What's Happening 3: Registered Intermediary Survey 2011*, City University London, *https://www.city.ac.uk/__data/assets/pdf_file/0008/126593/30-April-FINAL-Tell-Me-Whats-Happening-3.pdf* [Accessed October 23, 2014].

[37] Based on the second and third authors' experience as intermediaries.

[38] Based on the all the authors' experience and observations.

[39] MoJ, *Registered Intermediary Procedural Guidance Manual* (2012), p.10, *https://www.cps.gov.uk/publications/docs/RI_ProceduralGuidanceManual_2012.pdf* [Accessed October 23, 2014].

[40] Including review by the intermediary if there is one. There were no intermediaries in either *Lubemba or JP* [2014] EWCA Crim 2064; [2015] 1 Cr. App. R. 12 (p.137). This recent judicial initiative of requiring cross-examination questions in writing appears to have started at Leeds Crown Court as one of the "section 28", pre-recorded cross-examination pilot courts. It has quickly become standard practice in all s.28 Youth Justice and Criminal Evidence Act (YJCEA) 1999 pilot centres (i.e. Kingston and Liverpool Crown Courts as well) and is now being adopted in other courts in cases with vulnerable witnesses. It allows questions to be reviewed by the judge (and intermediary where one is involved) so as to avoid problems arising during actual cross-examination. In s.28 YJCEA 1999 cases,

> "The ground rules hearing should cover, amongst other matters, the general care of the witness, if, when and where the witness is to be shown their video interview, when, where and how the parties (and the judge if identified) intend to introduce themselves to the witness, the length of questioning and frequency of breaks and the nature of the questions to be asked. So as to avoid any unfortunate misunderstanding at trial, it would be an entirely reasonable step for a judge at the ground rules hearing to invite defence advocates to reduce their questions to writing in advance."[41]

When cross-examination questions are reduced to writing in advance and disclosed to the parties and/or discussed at the GRH it is surely understood,[42] though it would be better if it were explicitly stated in court, that proposed cross-examination must not be "telegraphed" in advance to the witness. The witness of course will not be there at the GRH. However in trials with co-defendants running "cut-throat" defences, careful thought needs to be given to whether questions reduced to writing should be shared with the parties or instead solely with the judge and the intermediary if there is one. Understandably some defence counsel might be reluctant to share the topics of cross-examination with their co-counsel let alone discuss the details of their cross-examination at a GRH especially when the defendants are there in the dock. Similarly with a GRH for a vulnerable defendant, prosecution counsel might baulk at the thought of going through her cross-examination questions at a GRH with the defendant present in court. In these instances the judge will need to find a way to "vet" the questions to protect the vulnerable person from unfairness and also and ensure the fair trial of the accused.

"Discussion before the day of trial is preferable to give advocates time to adapt their questions to the witness's needs"[43]; this should be so even when that witness is the defendant and the decision to testify is taken just after the close of the prosecution case when the defendant giving evidence would ordinarily be immediately called to the stand. In some areas GRH for young children are routinely happening three to four weeks pre-trial, which means that at the pre-trial visit the child can be prepared on the basis of agreed ground rules and also that advocates have time to plan and prepare their questions in line with the agreed ground rules.[44]

The 2014 intermediary survey[45] summarised the feedback as follows:

> "[The] issue now is not so much that [the GRH] should happen in an intermediary case but how it should be conducted. As one survey respondent said there seem to be 'two types', those that are proper and those that are perfunctory. There needs to be greater consistency; they ought to take place before the trial and be in the form of a discussion between the intermediary, judge and the advocates involved in the trial. Judges should also use the GRH

defence counsel are required to complete the HMCTS's "s.28 Defence Ground Rules Hearing Form" which includes space at s.8 to set out for the judge "all proposed questions".

[41] *Lubemba; JP* [2014] EWCA Crim 2064; [2015] 1 Cr. App. R. 12 (p.137) at [43].

[42] Stemming from both the barrister's and the intermediary's overriding duty to the court (see the *BSB Handbook* (2014), p.22, *Code of Conduct gC1 and the MoJ Registered Intermediary Procedural Guidance Manual* (2012), p.9) and a solicitor must "uphold the rule of law and the proper administration of justice" (see the *SRA Code of Conduct* 2011, Principle 1).

[43] CPD 2014 3E.3

[44] Based on the third author's experience as an intermediary.

[45] P. Cooper *Highs and lows: the 4th intermediary survey* (2014), Kingston University London 21, *http://eprints.kingston.ac.uk/28868/1/Cooper-P-28868.pdf* [Accessed October 23, 2014].

as an opportunity to check that the advocates have sought the advice of the intermediary to ensure their planned questions are framed in a way that is likely to achieve the best quality evidence from the vulnerable person. The author has observed that this has now become standard practice in 'section 28' pilot cases."[46]

The Criminal Procedure Rule Committee considered the first author's 2014 survey findings and recommendations and as a result included ground rules in amendments coming into force on April 6, 2015. Inserted within CPR r.3.9 "Case preparation and progression" are CPR r.3.9.7:

"(7) Where directions for appropriate treatment and questioning are required, the court must-
- (a) invite representations by the parties and by any intermediary; and
- (b) set ground rules for the conduct of the questioning, which rules may include—
  - (i) a direction relieving a party of any duty to put that party's case to a witness or a defendant in its entirety,
  - (ii) directions about the manner of questioning,
  - (iii) directions about the duration of questioning,
  - (iv) if necessary, directions about the questions that may or may not be asked,
  - (v) where there is more than one defendant, the allocation among them of the topics about which a witness may be asked, and
  - (vi) directions about the use of models, plans, body maps or similar aids to help communicate a question or an answer."

In response to the first author's intermediary surveys, intermediaries have identified numerous practical matters to address at a GRH. These together with the CPD (2014) and the 2015 amendments to the CPR are reflected in the checklist at the end of this article.

Ground rules which restrict cross-examination in "the traditional way"

Since 2010 the Court of Appeal has been re-writing the rules for cross-examination of vulnerable witnesses.[47] If an advocate argues[48] that their duty to their client absolutely requires them to put certain matters in cross-examination, they may have missed the point (and the jurisprudence) that it is the judge's responsibility to manage cross-examination so that it is fair. Fair questioning takes into account the communicative and psychological vulnerability of the person being questioned.

[46] Section 28 of the YJCEA 1999; pre-recorded cross-examination of vulnerable witness evidence is being piloted in Kingston, Leeds and Liverpool Crown Courts in 2014/15.

[47] For an analysis of some key cases see E. Henderson, "All the proper protections - the Court of Appeal rewrites the rules for the cross-examination of vulnerable witnesses" [2014] Crim. L.R. 93.

[48] As was done for example in *B* [2005] EWCA Crim 805; [2006] Crim. L.R. 54 at [9].

A child or mentally vulnerable adult in the alien and intimidating environment of a court can be pressured into agreeing with a loaded, leading question. The vulnerable witness (or defendant, since the protections must apply equally to a vulnerable defendant giving testimony) could end up acquiescing because they have not understood, or because they wish to please the questioner, and retracting[49] their earlier evidence because of the unfair pressure. The pressure stems from the situation they find themselves in coupled with the way the question is posed. Leading questions may not even be a suitable and proper means of challenging the account of a "robust" adult witness.[50]

One of the most contentious case management issues that might arise at a GRH is whether the trial judge will allow the defence advocate to put their case to the witness in the "traditional way".[51] The traditional way is to cross-examine using leading questions that suggest to the witness that they are wrong or lying, typically with a question such as "That didn't really happen did it?" or "You are telling lies, aren't you?" or a statement such as "I put it to you that this is what really happened …". In *E*[52] the defendant denied punching C, a witness aged six at trial. The Court of Appeal said

> "we struggle to understand how the defendant's right to a fair trial was in any way compromised simply because [defence counsel] was not allowed to ask: 'Simon did not punch you in the tummy, did he?'"[53]

and they were satisfied that the trial was not unfair:

> "The jury knew that the defendant disputed the evidence of C. The judge clearly explained his decision as to cross-examination technique and why he had taken it. In addition, the jury was specifically directed 'to make proper fair allowances for the difficulties faced by the defence in asking questions about this.'"[54]

For justice to be done, questions which put an opposing version of events to the witness must be put fairly; questions must be capable of being understood by the witness and must not apply unfair pressure. Not putting the opposing version to the witness potentially deprives the witness of the opportunity to have their evidence tested which may (somewhat paradoxically) diminish the weight of the witness's testimony in the eyes of the jury. Some advocates may even be eager to have the judge place a restriction on putting their case to the witness.[55] Defence advocates may, as a matter of tactics, think:

> "If I am not allowed by the judge to put my client's case in the traditional way because it is regarded as unfair pressure, I would rather the jury were

[49] As happened in *W* [2010] E. Hughes LJ (now a justice of the Supreme Court) said: "It is generally recognised that particularly with child witnesses short and untagged questions are best at eliciting the evidence", at [30].

[50] See D. Caruso, J.M. Wheatcroft, and J. Krumrey-Quinn, "Rethinking Leading: The Directive, Non-Directive Divide" [2015] Crim. L.R. 340 and also for a neat précis of research challenging the presumed usefulness of leading questions see E. Henderson ""Did you see the broken headlight?" Questioning the cross-examination of robust adult witnesses" (2014) 10 *Archbold Review* 2014 4.

[51] Restrictions may be applied by the judge — CPD 2014 3E.4.

[52] *E* [2011] EWCA Crim 3028; [2012] Crim. L.R. 563.

[53] *E* [2011] EWCA Crim 3028; [2012] Crim. L.R. 563 at [28].

[54] *E* [2011] EWCA Crim 3028; [2012] Crim. L.R. 563 at [28].

[55] Guidance for judges on how this should be done now appears in the CPD 2013 3E.4

advised about the restriction on me than have to reframe my questions fairly and let the witness explain their version of events."

Consider this cross-examination of a six-year-old prosecution witness.[56] Defence counsel wanted to put the case in the traditional way however on intermediary advice the judge required the defence to reword the questions. The defence case was simply that it didn't happen. Questions defence counsel originally wanted to put:

Q: D didn't put his willy in your mouth, did he?

Q: D didn't put his willy in your bottom, did he?[57]

With the judge's approval and on the advice of the intermediary, defence counsel's questions were reframed. The traditional statement and tag form was avoided. Instead two simple statements were followed by a simple question for each of the above, for example:

Q: You said D put his willy in your mouth.

D says he didn't put his willy in your mouth.

Did D really put his willy in your mouth?

What followed in cross-examination was this:

Q: You said D put his willy in your mouth.

D says he didn't put his willy in your mouth.

(Before counsel could ask Did D really put his willy in your mouth?)

A: Well he is joking with you because he did put his willy in my mouth.

Q: You said D put his willy in your bottom.

D says he didn't put his willy in your bottom.

(Again, before counsel asked did D really put his willy in your bottom?)

A: Well D is just JOKING ABOUT[58]*with you guys down there. Because he really, really did put his willy in my bottom LOADS OF TIMES.*

This example illustrates how an intermediary (or it could be someone else similarly qualified to advise on the witness or defendant's communication needs) can be crucial in the setting and application of ground rules including advising on the fair wording of questions.[59] Online guidance on the running of GRHs procedures exists to assist judges[60] and advocates,[61] however, case management and adjusting questioning technique *for a particular witness or defendant* without expert advice is less than ideal. Even when there is an intermediary things can go wrong, as the following case study illustrates.

Case study

We describe briefly a case study of the experiences that are still occurring and how a GRH should be carried out.

[56] Based on the case note of the intermediary

[57] D is in place of the defendant's name. The case study has been anonymised for obvious reasons.

[58] Capitals denote the witness raising her voice.

[59] MoJ Registered Intermediaries for witnesses are in short supply, see P. Cooper, *Highs and Lows: The 4th Intermediary Survey* (2014), Kingston University London, pp.22–23, *http://eprints.kingston.ac.uk/28868/1/Cooper-P-28868.pdf* and for defendants there is no statutory entitlement to an intermediary, see P. Cooper and D. Wurtzel, "A day late and a dollar short: in search of an intermediary scheme for vulnerable defendants in England and Wales" [2013] Crim. L.R. 4.

[60] Judicial College, *Equal Treatment Benchbook* (2013), Children and Vulnerable Adults, p.14.

[61] See the Advocacy Training Council's *theadvocatesgateway.org* [Accessed March 24, 2015] which is referred as "best practice" in the CPD 2014 3D.7.

What happened at a Ground Rules Hearing[62]

The witness was a young man, W, who presented with severe mental illness. He was taking prescribed medication which partly assisted in alleviating his symptoms. W had no known learning difficulties or other condition likely to affect his comprehension or expression. In conversation he had high levels of expressive language. He had completed a video-recorded police interview without the assistance of an intermediary. The police interviewer had been highly skilled in questioning him in a non-threatening manner and, although it had been difficult for him he had appeared to cope well with the questioning.

In light of W's mental illness the CPS requested a registered intermediary (RI) to assess his communication needs before the trial. The RI's recommendations were related to reducing anxiety and stress to a minimum including: giving evidence from the live link room, attending a court familiarisation visit, pre-viewing of his ABE DVD, minimising waiting time, and having an intermediary present during questioning at trial. The RI did not believe it was necessary to make any suggestions about sentence structure or language as W presented with above average verbal language skills at assessment.

The RI expected to participate in a Ground Rules Hearing in the court room with the trial judge and counsel. She was particularly keen to discuss how she could signal an intervention if required, how the court would manage breaks, how her role would be described to the jury and where she should make her intermediary declaration. However, despite the RI's persistent requests through the prosecution advocate, the judge did not allow the RI to participate in a Ground Rules Hearing. The RI went into the live link room with W. The judge refused the RIs request to make the intermediary declaration. The judge asked W to indicate if he needed a break. The judge did not address the RI at all. When defence counsel cross-examined W there were questions with double negatives, tag questions, statements without a question, long preambles to questions, questions with subordinate clauses and complex sentences followed by "that's right isn't it" or "you did didn't you". The RI intervened on a couple of occasions to indicate that the camera in court needed repositioning on counsel and once to ask for a rephrasing of a multipart question that confused her. The RI did not think she should intervene on sentence structure as she had not recommended simple, untagged questions in her report. Between questions, the RI asked W if he needed a break but he said no, he said he just wanted to get it over. Cross-examination lasted one hundred minutes and there was no break.

What should have happened …

This GRH was perfunctory; the hearing should have taken place at least a day before the actual questioning to give counsel the chance to plan questions.

The intermediary should have been invited to advise on the proposed questions. Even without mention in the intermediary report counsel should have used, or been required by the judge to use, short and untagged questions.[63] The hearing

[62] Written from the perspective of the intermediary, this case is a summary of what happened. Some witness details have been changes to preserve anonymity.

[63] *W* [2010] EWCA Crim 1926

should have been a discussion involving the intermediary. It should have established a shared understanding of the RI role during testimony, determined when the intermediary would make her statutorily required declaration[64] and judge and counsel should have agreed how her role would be described to the jury. Had the GRH been conducted properly cross-examination could have been properly managed, and the witness would have been treated appropriately and questioned fairly in accordance with the Criminal Procedure Rules.

Conclusion and checklist

Judges' responsibilities to manage the case including the treatment of witnesses and defendants existed long before the introduction of intermediaries or GRHs. Though the GRH has put case management for vulnerable witnesses and defendants on a more formal footing they are conducted in a wide variety of ways and not always well. The authors have devised a checklist which it is hoped will increase understanding and lead to better, more consistent practice.[65]

Ground Rules Hearing Checklist[66]

A: Judge and advocates should remind themselves of the purpose and form of a Ground Rules Hearing (GRH)

A GRH enables a trial judge to set the parameters for the fair treatment (including questioning) of a vulnerable defendant or a vulnerable witness at trial. It should be in the form of a discussion between the trial judge and advocates, and the intermediary if there is one, taking into account the particular communication needs of the witness or defendant. The discussion should be in court and an accurate note of the discussion, and of the agreed ground rules must be kept:

> "In the absence of an intermediary for the defendant, trials should not be stayed where an asserted unfairness can be met by the trial judge adapting the trial process with appropriate and necessary caution (*R v Cox* [2012] EWCA Crim 549, [2012] 2 Cr. App. R. 6)"[67]

B: The Advocate's Gateway

If they have not done so already, the advocates should consult the *advocatesgateway.org*[68] in order to view the Criminal Bar Association training film "A Question of Practice" and read the relevant toolkit/s.

[64] Section 29(5) YJCEA 1999: "A person may not act as an intermediary in a particular case except after making a declaration, in such form as may be prescribed by rules of court, that he will faithfully perform his function as intermediary."

[65] A. Gawande, *The Checklist Manifesto How to Get Things Right*, (London: Profile Books Ltd, 2011).

[66] Based on the CPR (2015), CPD 2014, case law, the authors' observations and experiences of Ground Rules Hearings and survey data from P. Cooper, *Tell Me What's Happening 3: Registered Intermediary Survey 2011* (2012), City University London*https://www.city.ac.uk/__data/assets/pdf_file/0008/126593/30-April-FINAL-Tell-Me-Whats-Happening-3.pdf* [Accessed March 23, 2015] and P. Cooper, *Highs and Lows: The 4th Intermediary Survey* (2014), Kingston University London, *http://eprints.kingston.ac.uk/28868/1/Cooper-P-28868.pdf*.

[67] CPD 2014 3F.6

[68] CPD 2014 "3D.7 These toolkits represent best practice".

C: GRH discussion

Facilitating the role of the intermediary

If there is an intermediary they must be included in the GRH discussion and in particular their report/s[69] considered and discussed particularly if a report recommendation is disputed. The intermediary is not a witness and is not required to be in the witness box for the GRH. The hearing is a discussion and the hearing is not for cross-examination of the intermediary. The intermediary is not required to take the intermediary oath at this stage.

At the GRH discuss:

1. Whether advocates have shown the intermediary the wording of their proposed questions and taken advice on the suitability of the wording and communication style.[70]
2. Where the intermediary will stand/sit during the trial (for the defendant) or testimony (if for a witness) so that she is able to observe and intervene to assist with communication whilst all the time being visible to the judge, advocates and jury.
3. If the intermediary is for a defendant, where she will sit in relation to other defendants (if any) and dock officers in the dock.
4. Where and when the intermediary will take the intermediary oath.
5. If the intermediary and witness will be in a remote location practical issues such as who will administer the oath and how exhibits would be made available to the witness.[71]
6. How the intermediary will be addressed in court in front of the vulnerable person for example it might be by her first name if that is how the witness knows her.
7. How the intermediary will intervene/get the judge's attention if there is a communication issue or the intermediary needs to discuss a communication issue with judge and counsel in the absence of the jury.
8. How the role of the intermediary will be explained to the jury in a way that explains they are not a witness but that their role is to assist everyone to achieve complete, accurate and coherent communication with the vulnerable person.
9. If communication aids are to be used, how the intermediary will assist with these.
10. Any other recommendations in the intermediary's report.

[69] Some cases will require an addendum to the original intermediary report particularly if the witness's/defendant's needs have changed since the initial assessment and report which may be many months old by the time of the trial. Also if the first assessing intermediary is no longer available for the trial a 'new' intermediary will need to conduct her own assessment and write a report, albeit that only a short addendum to the original report may be required.

[70] CPR 2015 3.9.7(b)(iv) the court can set "directions about the questions that may or may not be asked".

[71] See *http://www.theadvocatesgateway.org/images/9planningtoquestionsomeoneusingaremotelink100714.pdf* [Accessed March 23, 2015].

Participation of the vulnerable defendant

In so far as this has not been covered above, discuss (including with the intermediary if there is one):

11. Whether an interpreter is required for the trial.[72]
12. Where the defendant will sit during the trial for example in the dock or next to the defence lawyers.
13. If anyone will accompany the defendant in the dock for example if the defendant requires the support of a nurse.
14. Whether the vulnerable defendant will need assistance in the dock to access/follow written evidence and if so how this will be achieved.
15. Start and end times of the trial days.
16. Scheduled breaks during the trial day including for example time to take medication, extra time to go through papers with a defendant who cannot read and extra time to allow advocates to take instructions.[73]
17. How a request for an unscheduled break will be notified, if required.
18. "[G]round rules for all witness testimony to help the defendant follow proceedings; for example, directing that all witness evidence be adduced by simple questions".[74]
19. How and when the defendant will be familiarised with the courtroom.[75]
20. Use of communication aids for example iPad/tablet, hearing loop, stress/concentration aids, break cards, visual timetable and writing/drawing materials.

Ground rules may need to be revisited if during the trial the defendant's effective participation is still not being achieved. Then, if the defendant later elects to give evidence there would normally be a further GRH specifically to discuss how questioning should be conducted (see next section).

Fair questioning of a vulnerable person (witness or defendant)

Discuss (including with the intermediary if there is one):

21. Whether an interpreter is required for the person's testimony.
22. Whether it is necessary to appoint a lawyer for an unrepresented defendant to protect the witness from cross-examination by the accused.[76]
23. Whether the person will give evidence on oath or not and any assistance they might need to take the oath.
24. Whether the person will give evidence in court or over a live link?[77]

[72] CPR 2014 at p.14 "Directive 2010/64/EU of the European Parliament and of the Council of 20th October, 2010, on the right to interpretation and translation in criminal proceedings".
[73] CPR 2014 at p.14 "Directive 2010/64/EU of the European Parliament and of the Council of 20th October, 2010, on the right to interpretation and translation in criminal proceedings".
[74] CPD 2014 3F.6.
[75] CPD 2014 3G.2.
[76] YJCEA 1999 s.34–40.
[77] YJCEA 1999 s.33A for an eligible defendant and YJCEA 1999 s.24 for an eligible witness.

25. How other special measures[78] which may have previously been ordered will be implemented for example, a screen, evidence given in private, evidence pre-recorded, wigs and gowns removed by judge and advocates, a witness supporter, use of communications aids[79] such as models of maps, timelines, charts, pictures, etc. Use of communication aid/s such as body maps for trial of a sexual offence[80] should be considered.
26. How special measures will be combined if more than one—a "combination of special measures may be appropriate. For example, if a witness who is to give evidence by live link wishes, screens can be used to shield the live link screen from the defendant and the public, as would occur if screens were being used for a witness giving evidence in the court room".[81]
27. Where the advocates will be when they conduct their questioning for example from court over live-link or in the live-link room.[82]
28. How long cross-examination is likely to take and how long it will be permitted to last each day taking into account relevant matters such as the witness's concentration abilities, effects of prescribed medication, etc.
29. When there will be scheduled breaks during the trial day including duration and nature of breaks.
30. How a request for an unscheduled break will be notified, for example due to an urgent medical need arising,
31. Whether all breaks should involve adjourning the court or whether brief breaks may speed proceedings for all. Many courts have agreed breaks of up to three minutes for young children; during a short, non-adjourned break (the court stays sitting) and the microphones and cameras to the live link room are temporarily made visible only to the judge, enabling the witness to take a few minutes in the live link room to re-orientate or calm themselves. This avoids the need for the jury to be sent out and brought back which would be unnecessarily time consuming.
32. Whether the judge has seen the advocates' proposed questions and determined if they are appropriate (if there is an intermediary they should also have been reduced to writing shown to the intermediary).
33. How repetitious questioning will be avoided when there are separately represented defendants.[83]
34. If limitations are going to be placed on cross-examination, how these will be explained to the jury.[84]

[78] YJCEA 1999 ss.23–30 are available for eligible witnesses but not the accused, YJCEA 1999 ss.16 and 17.
[79] A comprehensive communication aids toolkit will be published on *theadvocatesgateway.org* [Accessed March 24, 2015] in the early part of 2015.
[80] See CPD 2014 3E.6
[81] CPD 2014 29A.2 and CPR 2015 r.3.9.7(b)(v)
[82] D. Wurtzel, "Time to change the rules?", *Counsel*, November 2012, p.32.
[83] See CPD 2014 3E.5. See also *R. v Jonas* [2015] EWCA Crim 526.
[84] CPD 2014 3E.4.

35. How and when the person will be familiarised with the witness box/live link room/remote live link site if this has not happened already.[85]
36. How and where and when the person will have their memory refreshed by watching the DVD recording of their ABE interview if any.[86] Note there is no requirement for the witness to watch their ABE at the same time as the jury.
37. Whether and how the judge/judge and advocates will meet the person beforehand.[87] Discussion may include matters such as whether the judge/advocates will be robed.
38. The best time of day for the person's testimony to start.
39. Whether the person will need assistance during testimony referring to/accessing written for example maps, photos, diagram, transcripts, etc.
40. How the court will be enabled to access the person's non-verbal communication, for example indicating, pointing, drawing, writing. For example will the intermediary number the pages of the drawings in sequence? Will she then hold them up to the live link cameras as the witness produces them?

The GRH should be a standard feature of case management in a trial where a witness or defendant is vulnerable. It will be interesting to see if the GRH is adopted more widely:

> "In due course, consideration should be given to whether or not this [Ground Rules Hearings] approach may sensibly be extended to other areas of cross-examination in which it may take place (for example, with expert witnesses)."[88]

[85] This should include practising communicating over live-link, simply being shown it is not enough: CPD 2014 29B.4.

[86] CPD 2014 Evidence 29C: Visually Recorded Interviews: Memory Refreshing and Watching at a Different Time from the Jury.

[87] See *Lubemba* [2014] EWCA Crim 2064; [2015] 1 Cr. App. R. 12 (p.137) at [44]: "In general, experts recommend that the trial judge should introduce him or herself to the witness in person before any questioning, preferably in the presence of the parties. This seems to us to be an entirely reasonable step to take to put the witness at their ease where possible." It can also assist with communication during questioning.

[88] The Rt Hon Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (2015), 8.3.1 Ground Rules approach, para.267. *http://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf* [Accessed April 22, 2015].