DEKA
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BRIEFING
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BEST EVIDENCE

Introduction by
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INTRODUCTION

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Welcome to the Deka Chambers January Briefing where we draw once again upon our multi-disciplinary expertise to deliver a series of articles which examine key themes in litigation. For this edition we consider Best Evidence. Success at trial is often as much about enabling clients to give their best evidence as it is finding the overlooked legal point. In this series of articles members of chambers consider aspects of forensic preparation and case management which will put our clients in the best position to succeed at trial.

To start the ball rolling Julia Brechtelsbauer analyses the rules of court designed to enable vulnerable witnesses in clinical negligence cases. Continuing with this theme Anirudh Mandagere considers how the court will manage the forensic process in civil abuse claims following *IMX v L* [2024] EWHC 2183 (KB), decided by former member of chambers Ritchie J. Meanwhile Paul Stagg KC considers the oft-misunderstood evidential rules concerning medical records the proper application of which can expedite the trial timetable and avoid unproductive oral evidence. Next up Andrew Spencer discusses circumstances where the court might be invited to draw adverse inferences from the failure to make a witness available for cross-examination.

Moving to live evidence, Sarah Prager KC draws on her travel law expertise to consider the rules governing the management of witnesses whose first language is not English and who may wish to give evidence from overseas. We then cross to the criminal jurisdiction where Louise McCullough considers developments in the criminal courts which are designed to enable young or vulnerable witnesses to give their best evidence. Max Melsa concludes our Briefing with a cautionary article arising from a family law child protection case which concluded 151 weeks after issue against the statutory limit of 26 weeks. The case motivated MacDonald J to issue the *Local Practice Note: Ensuring Adherence to the Public Law Outline in London* on 28th November last year and included guidance on the use of the court timetable, expert evidence intermediaries. Essential reading for child protection lawyers.

For further information about Deka Chambers contact us via email on clerks@dekachambers.com or call us on 020 7832 0500.

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ENSURING BEST EVIDENCE FOR VULNERABLE CLINICAL NEGLIGENCE CLAIMANTS AND WITNESSES

By Julia Brechtelsbauer

Introduction

Equality of arms is of course a principle at the heart of fairness in litigation. Ensuring that anyone may be able to give their "best evidence" despite any impairment suffered as a result of clinical negligence is an objective flowing from equality of arms. This article evaluates the impact of Practice Direction 1A and the evidence of vulnerable witnesses in clinical negligence proceedings.

Specific Importance in Clinical Negligence

The term "special measures" is everyday language for our family and crime colleagues, but it has only very recently become a possible feature of civil proceedings. "Special measures" relates to adaptions to a way in which a witness may give evidence, to ensure they give their *best* possible evidence, despite whatever may be potentially inhibiting them. In the clinical negligence context, there are countless examples where this may be crucial. Say, for example, the Claimant suffered from meningitis; there was a delayed diagnosis, and they suffer brain damage as a result. Their cognitive function may be impacted, but there is no reason why with adaption, they should not be able to fully participate in proceedings and give the evidence in the best possible way. It may be that they find some sentence structures confusing but easily respond to direct questions. Given that leading questions are the pro-forma of cross examination – if no adaptation were to be made - that would place such a Claimant at an unfair disadvantage. In clinical negligence, the particular unfairness may be that it is *as a result* of the alleged negligence of the defendant themselves.

This also raises an additional important point, which is that the enquiry into capacity is not the only pertinent investigation to make. Just because someone has capacity, does not mean that they should be subject to procedure, hearings, and the full force of litigation without adaptation. Further, vulnerability is broader than capacity. Namely, capacity usually concerns who should be a *party* i.e. should it be the claimant, or their litigation friend, should they lack capacity. Whereas vulnerability may extend beyond that perimeter – it may be a witness for the Claimant (for example, a family member).

Practice Direction 1A

CPR 1.6, "Participation of vulnerable parties or witnesses", was added by the Civil Procedure Rules 2021 so as to give effect of Practice Direction 1A. The Practice Direction addresses (1) when a party/witness is vulnerable and (2) what the court may do in response and (3) best practice/procedure concerning the same.

It is important to clarify, just because a party is *vulnerable* does not mean they are vulnerable for the purposes of PD1A: "A person should be considered as vulnerable when a factor – which could be personal, situational, permanent or temporary – may adversely affect their participation in proceedings or the giving of evidence." (PD1A.3). Therefore, not only must they be "vulnerable" such vulnerability must impact their participation or giving of evidence. For clinical negligence purposes, the following factors may be particularly pertinent:

- Communication or language difficulties,
- Physical disability or impairment, or health condition
- Mental health condition or significant

impairment of any aspect of their intelligence or social functioning (including learning difficulties)

Further, although post-*Paul* (*Paul v Royal Wolverhampton NHS Trust* [2024] UKSC 1) it may remain difficult to recover for psychological damage caused because of clinical negligence, that a person has witnessed a traumatic event and suffered as a result may be taken into account in terms of how they give their evidence. It is specifically mentioned as a factor in PD1A.4 (e). Take, for example, facts similar to *Paul*, that the daughter of the Claimant witnesses her father collapse as a result of a heart defect. The PTSD such a person suffers may be triggered even by the context of that event – and therefore "in effect" when giving evidence on say, quantum concerning her father.

When considering whether such factors may adversely affect a party, the court should consider their ability to (PD1A.5):

a) Understand the proceedings and their role in them;
b) Express themselves throughout the proceedings;
c) Put their evidence before the court;
d) Respond to or comply with any request of the court, or do so in a timely manner;
e) Instruct their representatives (if any) before, during and after the hearing; and
f) Attend any hearing.

Procedurally, PD1A recommends:

1. Identifying vulnerability of parties or witnesses at the earliest possible opportunity. (PD1A.6)
2. Before ordering any ground rules, special measures or other support, the court must consider the views express by a party or witness about participating in proceedings or giving evidence. (PD1A.9)

Concerning what measures should be put in place, as laid out in general "vulnerability of a party or witness may impede participation and also diminish the quality of evidence. The court should take proportionate measures to address these issues in every case" (PD1A.2). It is important to emphasise that the measures laid out in PD1A are just examples (PD1A.7 "this *may* include", and PD1A.10 "special measures *may* include"). The court "may order appropriate provisions to made to further the overriding objective." (PD1A.7). Those specifically mentioned in PD1A are:

- Concealing the address and/or contact details of either party for appropriate reasons;
- Preventing a party or witness from seeing another party or witness by the use of screens;
- Allowing a party or witness to give evidence remotely by video conference;
- Hearing a party or witness's evidence in private;
- Dispensing in the hearing of wigs and gowns;
- Admitting pre-recorded video evidence;
- Questioning a party or witness through an intermediary; and
- Using a device or other aid to help a party or witness communicate.

In thinking about special measures, given that PD1A does not *limit* what may be put in place, clinical negligence practitioners would be well advised to consult the Advocates Toolkit 3, and across other practice areas (see for example Practice Direction 3AA Family Procedure Rules). For example, in a Ground Rules Hearing in a criminal proceeding, it is practice for questions to be written out, approved by the judge and then put in cross-examination as approved. Although not mentioned by PD1A, this may be a useful "special measure" to consider.

Clinical negligence cases also have the specific advantage of often having reference to an expert who may be able to assist in suggestions of what will allow a person to

give their "best evidence" - perhaps most obviously an occupational therapist. Although that might be obvious, parties should hesitate before incurring the costs of experts advising on the same, as such evidence would still be subject to CPR35 and needing to be "reasonably required to resolve the proceedings".

Expert Evidence

In *Crypto Open Patent Alliance v Wright* [2023] EWHC 2408 (Ch) Mellor J addressed the issue of where it is necessary to establish whether a party or witness is in fact vulnerable. The Defendant applied for permission to adduce a psychiatrist report as expert evidence on autism spectrum disorder as he wishes to argue for adjustments concerning his cross-examination. The Claimant opposed, contending that (1) the application was too late and there was insufficient time for the Claimant to instruct an expert and produce a report prior to trial (2) the Defendant had managed to be cross-examined in earlier proceedings without any apparent difficulty and (3) there appeared to be expert shopping since the Defendant had mentioned 3 different names in separate proposals. The Claimant highlighted that the expert has not been given the available transcripts or recordings of previous proceedings, or talks or lectures where the Defendant had spoken without any apparent difficulty.

Mellor J allowed for the report to be adduced, and he allowed timetabling for the Claimant to serve an expert report in response. He did not determine at that point whether adjustments were necessary, as the Claimant ought to have an opportunity to serve their report in response. Mellor J reasoned as follows:

1. The fact the expert had not seen the previous proceedings or lectures did not justify rejecting the report outright. Autism is a spectrum, and he may be able to deal with familiar environments better than unfamiliar circumstances.
2. Although in previous proceedings a judge considered the Defendant's evidence unreliable, "One does not know whether the same views would have been expressed if some or more adjustments had been made." [Paragraph 134].
3. Both the Advocates Toolkit 3 and PD1A make clear that one may not appreciate (fully or at all) the effects of a witness's vulnerability without some expert guidance.
4. A trial judge cannot be assumed to be able to conduct a fair trial simply through observation of the witness.

It is important to emphasise, expert evidence is not automatic in every case in which there is a vulnerable witness "but only in reasonably exceptional cases where it is proportionate and fair for the parties to incur the cost…" (at [148]). Though clearly, if the judge reasoned on the basis of PD1A, and the Advocates Toolkit, it may be difficult to imagine a scenario where such expert evidence may not be "reasonably required". The extensive caselaw on CPR35 ought to be considered with a particular lens when considering vulnerability and reasonable adjustments. It ought also of course to be emphasised that parties were bitterly opposed in *Crypto***.** It may be that experts can be liaised with, who are already instructed within a clinical negligence case (as opposed to a commercial case) and measures can be agreed between parties.

Conclusion

With this brief overview, it is hoped that just because a witness may find *ordinary* evidence and procedure difficult, does not mean that such a witness should be excluded from giving evidence. Participation may be important to a witness or a Claimant, and they should not be prohibited from the same just as a result of any difficulties they may face. Practitioners should remain creative in how they address issues. Indeed, such special measures may ease a witness'

concern about giving evidence and therefore their anxiety about pursuing a trial. This in turn could assist in achieving the best outcome for the client.

VULNERABLE WITNESSES IN ABUSE LITIGATION

By Anirudh Mandagere

On 6th April 2021, the court's approach to vulnerable witnesses changed. Following the recommendations in the Civil Justice Council Report on Vulnerable Witnesses, a new Practice Direction was introduced (CPR PD1A) and the Overriding Objective was amended. In particular, CPR 1.1(2)(a) was amended to require a court to ensure that parties "*can participate fully in proceedings, and that parties and witnesses can give their best evidence"*.

When a witness or party has been identified as vulnerable, the court should consider ordering ground rules before a vulnerable person is to give evidence, to determine what directions are necessary in relation to (a) the nature and extent of the evidence, (b) the conduct of the advocates and/or the parties in respect of the evidence of that person, (c) whether one or more special measures and/ or any other support should be put in place for that person; and (d) any duty or power of the court under any enactment or its inherent jurisdiction to prohibit, limit or modify cross-examination of or by a vulnerable witness or to appoint a legal representative to conduct a cross-examination (CPR PD1A paragraph 8).This article will consider two cases in which court procedure has been adapted in abuse cases, and provide practical guidance for practitioners operating in this field.

GKE v Gunning [2023] EWHC 332 (KB)

As a reminder, the legal framework for **Facts.** The Defendant was a qualified counsellor, who provided well-being coaching and private counselling to the Claimant. The Claimant asserted that the Defendant caused her psychiatric injuries by abusing his position of trust in relation to her during and between coaching / counselling / therapy sessions by making sexual comments and communications and specifically by asking her to undress and to masturbate in front of him in a therapy session or sessions. The Claimant was legally represented, and the Defendant acted as an unrepresented litigant.

A few weeks before trial the Claimant applied, based on her psychiatric evidence, for a vulnerable witness order. The order specifically permitted the Claimant to raise any objections to the cross-examination questions at the start of the trial. The Claimant was permitted to attend trial by video-link, and the Defendant was barred from cross-examining the Claimant directly. The trial judge (Mr. Justice Ritchie) was required to verbalise the Defendant's questions from the list. Three procedural issues arose during this hearing.

Issue 1: The Defendant's Cross-Examination. During re-examination of the Claimant, it became apparent that the Claimant's lawyers and the Claimant had seen the Defendant's written cross-examination, and that the Claimant had gone through the questions with her lawyers. Mr. Justice Ritchie expressed serious concern about this approach because it created an uneven playing field. It was not fair to the Defendant and degraded the Claimant's evidence. Indeed, the Defendant had not been provided with the Claimant's cross-examination in advance. In light of this, Mr. Justice Ritchie took great care to approach the Claimant's cross-examination answers with the uneven level playing field in mind.

Issue 2: Use of Video-Link. The Claimant gave video-link from counsel's chambers, and was accompanied by her solicitor. In the notes to CPR 32.3, which permits evidence by video-link, it is specifically pointed out that the Court does not have the same degree of control over a witness at a remote site

compared to one in court. Indeed, in *Navigator Equities Ltd v Deripaska* [2020] EHC 1798 (Comm), the judge noted that where there was "*any arrangement other than that the witness will be on their own during their evidence"* should be approved by the court, in advance if possible. Parties should not assume that an arrangement will be improved just because it is agreed between them.

Issue 3: Screening Evidence. The Claimant was initially off screen because this had been arranged by her solicitors. The vulnerable witness order did not permit the Claimant to give evidence screened. After discussion with counsel, an arrangement was made where the Defendant could not see the Claimant but the court and her counsel could see her.

IMX v L [2024] EWHC 2183 (KB)

Facts. The Claimant, aged 60, was between 8 – 12 when her stepfather abused her in the family home. This was admitted by the Defendant (who acted as an unrepresented litigant), and the hearing was to assess damages. An application was made for special measures for the hearing of the assessment of damages, which was granted. This application had been supported by a witness statement from a Consultant Psychiatrist, Dr. Cooling. The measures imposed were that:

1. The Claimant could give her evidence from counsel's chambers.
2. The Defendant would submit his questions for cross-examination of the Claimant to the judge two weeks before trial.
3. Such questions (as approved) would be verbalised by the judge.
4. The Defendant was not permitted to address the Claimant directly during the hearing.

In addition to this, the Claimant would not be shown the questions before cross-examination. Further, the Claimant was only allowed her solicitor in the room with her, who was ordered to remain on camera for the duration of her evidence. Notwithstanding these measures, there were unforeseen practical challenges.

Issue 1. The format of the questions. The Defendant submitted four separate lists of questions, numbering 70 pages. Neither the pages nor paragraphs were numbered. The documents were not in Word form so could not be easily digitally marked. Deputy Master Marzec made manuscript amendments to the Defendant's list of questions. Given that they were in manuscript form, he could not share the list of questions as amended with the defendant.

Issue 2. The wording of the questions. The wording was not appropriate given that the judge and not the defendant would be verbalising the questions. The questions were drafted using the first person and included remorseful sentiments. These could not properly form the part of a cross-examination.

Issue 3: The nature of the questions. The list of questions was long and repetitive. They were all focused on the continuing relationship between the parties since the abuse. Neither the nature of continuing adult relationship between the claimant and the defendant nor the defendant's attitude towards the abuse was relied on in aggravation. It was not necessary for the claimant to be questioned at length about them. General questions were put to the Claimant to elicit her attitude towards the defendant and their adult relationship, and also some questions as to a number of specific incidents which the defendant wished to rely upon to show a relationship of genuine affection or at least friendliness.

Conclusion and Practical Steps

Notwithstanding the recent introduction of CPR PD1A, it is of vital importance for practitioners operating in the field of abuse. This is particularly key when, as above, the defendants act as unrepresented litigants. Practitioners must consider the following:

1. An application for a vulnerable witness order must be made ahead of time and supported by the relevant medical evidence (preferably from a Consultant Psychiatrist).
2. The directions should include provision, if needed, for (a) the location in which the vulnerable witness is to give evidence, (b) measures to ensure the fairness of the remote hearing, and (c) directions for cross-examination by an unrepresented litigant, including the format in which such questions are to be given to the judge.
3. The Defendant's cross-examination should not be shown to the Claimant's legal representatives or the Claimant in advance. This runs the risk of creating an uneven playing field and fortifies grounds for an unfair hearing.

MEDICAL RECORDS AS EVIDENCE

By Paul Stagg KC

The medical records of a party, usually the claimant, are often an invaluable source of contemporaneous evidence of what a claimant said and thought at the time that the record was made. They are usually made by a professional clinician who is unaware of the existence of the dispute in which the records may be adduced (if, indeed, the dispute has even come into existence at the time that the record is made). In many cases there will be disagreement as to the time of onset of a condition, its cause (particularly in relation to psychiatric conditions), its severity and how it was described by the patient. Medical records may, in such cases, be an invaluable source of evidence which is uncontaminated by involvement in stressful litigation which, as is recognised, can affect the veracity of the evidence of even an honest witness.

There are, however, two issues which are frequently neglected by practitioners in preparing cases. Assuming that the maker of the record is not called as a witness and does not give direct evidence of having made it, what is the evidential status of the records? And what, if anything, needs to be done by a party in order to rely on the content of the records as true?

A lack of attention to these issues can sometimes cause difficulties at trial. Where a party does not want records which appear adverse to their cases to be adduced, they may seek to erect procedural roadblocks. For example, it may be suggested that unless the clinician who made the record is called as a witness, the records are only admissible by agreement. A case which is sometimes suggested to be authority for such a proposition is *Denton Hall Legal Services v Fifield* [2006] EWCA Civ 169, [2006] Lloyd's Rep Med 251. In fact, *Denton Hall* says no such thing, and so far as *dicta* in the judgment of Buxton LJ do appear to restrict the use of medical records adduced at trial, those *dicta* are clearly erroneous and should not be followed.

Denton Hall was an upper limb disorder case that went extremely badly for the defendant at trial and on appeal; Wall LJ, who gave the leading judgment in the Court of Appeal, described the appeal as "wholly without merit" at para 68 and at paras 69-72 stated that it was "distasteful" or "unfortunate" that the appeal had been brought at all. The main thrust of the defendant's argument was that the judge had failed to take proper account of the content of the claimant's medical records as to the onset of the most serious symptoms and of what the claimant was reported to have said to one of the expert witnesses. In his observations agreeing with the dismissal of the appeal, Buxton LJ stated:

> 76. .... It seemed to be suggested that this material was evidential in its own right, and not merely as material that could have been used at the trial to discredit Mrs Fifield.
>
> 77. It is therefore necessary to remind ourselves of the evidential status of such material. What the doctor writes down as having been told him by the patient, as opposed to the opinion that he expresses on the basis of those statements, is not at that stage evidence of the making of the statement that he records. Rather where, as here, the record is said to contradict the evidence as to fact given by the patient, the record is of a previous inconsistent statement allegedly made by the patient. As such, the record itself is hearsay. It may however be proved as evidence that the patient did indeed speak as alleged in two ways. First, if the statement is put to the witness, she may

> admit to having made it. Alternatively, if she does not "distinctly" so admit the statement may be proved under section 4 of Lord Denman's Act 1865. Second, by section 6(5) of the Civil Evidence Act 1995 those provisions do not prevent the statement being proved as hearsay evidence under section 1 of that Act. If the court concludes that such inconsistent statement has been made, that goes only to the credibility of the witness; the statement itself cannot be treated itself as evidence of its contents. Authority is scarcely needed for so protean a proposition, but I would venture to mention the observations of Lord Esher MR in *North Australian v Goldsborough*....

In evaluating this analysis, it is necessary first to remind oneself of the statutory provisions which touch on the question. First, s1(1) of the Civil Evidence Act 1995 states that evidence is not excluded in civil proceedings "on the ground that it is hearsay". As we all learned in law school, a hearsay statement is an out-of-court statement which is tendered as evidence of the truth of its contents: see the definition in s1(2). Therefore, if a GP record states that on January 24th 2021, the claimant attended the surgery and complained of shooting pains in their wrist whenever they had been using a computer for a lengthy period, the record is hearsay evidence that the patient was at the surgery on that date, that they made the complaint that is recorded and that the claimant was experiencing those symptoms at that time.

The 1995 Act goes on to make provision for notice to be given of intention to rely on hearsay evidence, save where rules so state: s2(1), (2). In s2(4), it is made clear that a failure to give required notice does not affect the admissibility of the evidence. In relation to the adducing of previous inconsistent statements made by witnesses, s6(3) states that the requirements imposed by the Criminal Procedure Act 1865 continue to apply, but s6(5) then makes it clear that a statement adduced under the 1865 Act is not prevented "from being admissible by virtue of section 1 as evidence of the matters stated". The 1865 Act, which applies by s1 to civil as well as criminal proceedings, states in s4 that a previous inconsistent statement of a witness may be put on evidence provided that it has been properly put to the witness in cross-examination.

It is clear from a careful reading of the terms of s6(5) of the 1995 Act that its effect was misstated by Buxton LJ in *Denton Hall*. He was wrong to state that the statement "goes only to the credibility of the witness; the statement itself cannot be treated itself as evidence of its contents". The combination of s1(1) and s6(5) makes it clear that once the record has been properly put to the witness under s4 of the 1865 Act as a previously inconsistent statement, it then *does* become evidence of its contents under s1 of the 1995 Act.

The fact that Buxton LJ misstated the effect of the 1865 and 1995 Acts was common ground between counsel in *Charnock v Rowan* [2012] EWCA Civ 2, para 21. The matter did arise for decision in *Calderdale and Huddersfield NHS Foundation Trust v Atwal* [2018] EWHC 961 (QB), (2018) 162 BMLR 169, where Martin Spencer J was considering whether to allow a Trust to bring contempt proceedings arising out of a grossly exaggerated clinical negligence claim. Part of the evidence for the exaggeration was contained in medical records which the Trust sought to adduce. Counsel for the Trust, in the absence of an appearance by or representation of the defendant, drew attention to Buxton LJ's dicta. Martin Spencer J referred at paras 78-80 to textbooks and articles considering *Denton Hall*, and concluded that s1 did indeed make the records admissible as evidence of the truth of what they stated. There should, therefore, be no doubt of the use to which such records may be put.

However, that leads to the procedural question of how medical records are to be adduced. In *Denton Hall*, Buxton LJ was much exercised by what the trial judge and he perceived as an unfair ambush of the

claimant, where the defendant had pleaded a general non-admission in the Defence which had not been amended when the medical records were disclosed and where some of the records relied on had not even been put to the claimant in cross-examination: paras 78-82. His observations on this part of the case were adopted by David Pittaway KC, sitting as a Deputy High Court Judge, in *Cooper v Bright Horizons Family Solutions Ltd* [2013] EWHC 2349 (QB), paras 38-39. It behoves a party seeking to adduce records, therefore, to pay attention to the detail of how they should be adduced. A failure to do so may lead to the court giving less weight to the evidence under s2(4)(b) of the 1995 Act or even excluding it altogether under CPR 32.1(3).

It is outside the scope of this article to look at the rules governing what a party has to do to give proper notice of their case more generally, but clearly fair notice needs to be given, either by an amendment to the pleading if it is not sufficiently clear what the contours of the party's case about the records is, or in clearly-expressed open correspondence. In terms of the service of a notice, the party seeking to rely on the records should canvass well before trial whether its opponent objects to the inclusion of any of the medical records in the trial bundle. If they are to be in the agreed bundle, there is no need for a notice to be served because CPD PD 32 para 27.2 can be relied on: see *Charnock* paras 22-24; *BXB v Watch Tower and Bible Tract Society of Pennsylvania* [2020] EWHC 156 (QB), [2020] 4 WLR 42, para 63. Notices should be served under CPR 33.2(3) in respect of any records to which objection is taken. Another possible solution would be to seek a directions order that all medical records are to be admissible at trial as evidence of the truth of their contents. Such an order used to be made quite regularly, although it no longer forms part of the standard orders which are published online on the justice.gov.uk website.

In a case where a party refuses to accept the accuracy of their medical records, it is not usually necessary to call the clinician making it as a witness to rebut the party's assertions, at least where there is no suggestion that the clinician's treatment was negligent. The correct course, instead, is to rely on the notice as hearsay evidence and on s4(2)(a) of the 1995 Act, which requires the court to consider whether it is "reasonable and practicable .... to have produced the maker of the original statement as a witness" in evaluating the hearsay records. Except perhaps in the case of a particular record which is central to the issues in the case, the court is not likely to take much convincing that to call a clinician who likely has no memory of the patient to say that a record is in his or her handwriting or can be seen to have been made on a digital records system by them would be a waste of everyone's time. This avoids the horrific prospect of armies of clinicians being hauled into court away from their patients for no good purpose, and demonstrates that the misreading of Buxton LJ's dicta by some lawyers should not lead to the conclusion that medical records which are not agreed are only admissible if the clinician who made them is called as a witness.

ADVERSE INFERENCES

By Andrew Spencer

The best witnesses are those who were a party to the actual events the subject of the claim. But sometimes these people are not called as witnesses. There are many reasons why this may happen, including that the witness may not be available, may not be willing to assist, or it may be that the parties disagree about the importance of the evidence that the witness may be able to give. Whatever the reason, the result is that the other side is unable to cross-examine the absent witness. In that situation, that party is likely to invite the judge to draw adverse inferences.

The Supreme Court considered when such inferences could or should be drawn in *Efobi v Royal Mail* [2021] UKSC 33, an employment claim alleging direct discrimination by recruiters. The defendant did not call any of the people responsible for rejecting the claimant's applications, instead calling managers who were familiar with the recruitment process in general, who could speak to the likely reasoning of the recruiters, but not their actual reasons. The claimant asked the tribunal to draw adverse inferences, which the tribunal refused to do.

The Supreme Court rejected an overly legal and technical approach to whether adverse inferences should be drawn, holding that it was open to tribunals to draw adverse inferences, or not draw them, using their common sense, based on the particular context and circumstances of the case. The relevant considerations include whether the witness was available to give evidence; what relevant evidence it could be expected that witness could have given; what other evidence there was on the points in issue; and the significance of these points in the context of the case. The Supreme Court explained that "all these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules".

Where a party seeks to challenge a failure to draw adverse inferences on appeal, the first step is to set out the inferences it is alleged ought to have been made. The appellant must then show that no reasonable tribunal could have failed to draw the inference concerned. This "is, in its very nature, an extremely hard test to satisfy".

In *Efobi*, the claimant contended that two inferences should be drawn: firstly, that the applicants who were recruited for the jobs in question were of a different race or ethnic origin from the claimant; and secondly, that the recruiters were aware of the claimant's race when they rejected his applications.

On the first issue, the Supreme Court considered there could be no reasonable expectation that a party would call a witness in case that witness may recall information that could potentially advance the other side's case. There was no reason to infer that by failing to call the recruiters themselves, the respondent was seeking to withhold information about successful candidates' races.

On the second issue, the evidence was that thousands of applications were received. The tribunal found that there was no reason to believe that information on the application form about the claimant's town and country of birth was searched for, viewed or taken into account by the recruiters. Whilst it was possible that, had they been called, a recruiter may have said that they did look at this information, the Supreme Court considered it could not seriously be argued that no reasonable tribunal would have failed to make this inference.

Last year, a similar issue arose on appeal in *Miller v Irwin Mitchell* [2024] EWCA Civ 53. The claimant argued that the judge at first instance ought to have drawn adverse inferences from the fact that certain potential witnesses were not called. The Court of Appeal noted the test in *Efobi* for appealing a refusal to draw adverse inferences, and that it was a difficult test to satisfy.

Furthermore, the events in question were a telephone conversation many years ago. There was little factual dispute about that conversation, and there was a thorough contemporaneous written record of it. It was unlikely that the witness would have been able to provide reliable evidence, over and above the contemporaneous record. And the issue in the case – the existence and nature of any duty of care – was a matter of law for the court to decide, and not a matter for a lay witness to speculate about. In these circumstances, the judge's refusal to draw inferences was "entirely rational".

Whilst *Miller* is a helpful case for a party seeking to resist the making of adverse inferences, it is important to note the particular circumstances of that case: the key issue being a legal, rather than a factual one; the absence of any real factual dispute; and an excellent documentary record. In a case where there is a real dispute on the facts and little other evidence on a particular issue, then evidence of the people 'on the ground' at the time will be far more important.

TAKING EVIDENCE FROM ABROAD: AVOIDING COMMON PITFALLS

By Sarah Prager KC

Particular evidential issues arise in cases involving witnesses who either do not speak English as their first language, or who would prefer to give evidence from outside the jurisdiction, or both. In such cross-border cases great care must be taken to ensure that the witness involved is able to give his or her best evidence in a way permitted by the English procedural rules. Parties' representatives should ensure that the potential pitfalls are identified and avoided at an early stage in proceedings, failing which it is all too easy for important evidence to be degraded or even excluded.

Witnesses whose first language is not English

It is surprising how often the fact that a witness cannot speak fluent English is only uncovered at trial, usually with disastrous results. In all cases it is of course vital that witnesses give evidence in their own words and in a language in which they feel confident expressing themselves. Any witness who appears unwilling to speak to solicitors other than via a third party, or who does not correspond with solicitors in their own right, or who assures solicitors that their English is imperfect but 'good enough' should prompt further enquiries. In these cases more often than not it will be found when they come to give evidence that they are unable to read the English language witness statement prepared for them, rendering it of no evidential value whatever.

The correct approach when working with a witness whose first language is not English is set out in CPR Part 32 PD 18.1: the witness statement *'must, if practicable, be in the intended witness's own words and must in any event be drafted in their own language'* (cf also 32PD19.1(8) in this respect). The consequence of failing to comply with this provision is set out in 32PD26.1; the court *'may refuse to admit it as evidence and may refuse to allow the costs arising from its preparation'*, although the party seeking to rely on the statement may apply to the court for relief from this sanction (cf in this respect the decision in *Correia v Williams* [2022] EWHC 2824 (KB)).

It is notable, however, that the phrase 'own language' includes any language in which the witness is sufficiently fluent to give oral evidence (including under cross examination if required) and is not limited to a witness's first or native language. At first instance in *Raja Saeed Afzal v UK Insurance Ltd* [2023] EWHC 1730 (KB) the trial judge refused to hear evidence from a claimant in a claim for damages for personal injury arising from a road traffic accident in respect of which liability had been admitted on behalf of the defendant. The claimant had served a witness statement in which he set out his case, but the judge was concerned that it was written in English, which was not his 'native' tongue (he was fluent in both Urdu and English), and refused him permission to rely on it even though he was prepared to give evidence that he well understood all that was said in it. On appeal Freedman J accepted that '*it is important that if the witness does not speak English then the witness statement will be in that person's own language, which must then be translated and the translation filed and verified in accordance with para.23 of PD 32*'. However, he observed that that '*does not mean that it was intended that those who were bilingual, or those who were sufficiently fluent in English to give oral evidence including under cross-examination, should not be able to give their evidence in English'.* He pointed out that if all multilingual people coming before the courts were forced to give evidence in their 'mother tongue', the practical consequences for those people

would have the effect of restricting their access to justice. Further, '*if there were doubts about the proficiency of the claimant as to whether the claimant was sufficiently fluent, then that could have been tested with a view to considering whether the evidence should be excluded'.* Simply excluding the claimant's evidence altogether was not the proper course in these circumstances.

Witnesses giving evidence from abroad

CPR Part 32.3 allows the court to permit evidence to be given by way of video-link or by other means. However, tucked away in Annex 3 to the Practice Direction to Part 32 is a provision which has been the undoing of many an unwary practitioner:

"4. It should not be presumed that all foreign governments are willing to allow their nationals or others within their jurisdiction to be examined before a court in England or Wales by means of [videoconferencing]. If there is any doubt about this, enquiries should be directed to the Foreign, Commonwealth and Development Office (Public Facing Services, Taking of Evidence Team) TOE.Enquiries@fcdo.gov.uk with a view to ensuring that the country from which the evidence is to be taken raises no objection to it at diplomatic level. The party who is directed to be responsible for arranging the VCF (see paragraph 8 below) will be required to make all necessary inquiries about this well in advance of the VCF and must be able to inform the court what those inquiries were and of their outcome...

8. The court's permission is required for any part of any proceedings to be dealt with by means of VCF. Before seeking a direction, the applicant should notify the listing officer, diary manager or other appropriate court officer of the intention to seek it, and should enquire as to the availability of court VCF equipment for the day or days of the proposed VCF. The application for a direction should be made to the Master, District Judge or Judge, as may be appropriate. If all parties consent to a direction, permission can be sought by letter, fax or e-mail, although the court may still require an oral hearing. All parties are entitled to be heard on whether or not such a direction should be given and as to its terms. If a witness at a remote site is to give evidence by an interpreter, consideration should be given at this stage as to whether the interpreter should be at the local site or the remote site. If a VCF direction is given, arrangements for the transmission will then need to be made. The court will ordinarily direct that the party seeking permission to use VCF is to be responsible for this. That party is hereafter referred to as 'the VCF arranging party'...

16. Some countries may require that any oath or affirmation to be taken by a witness accord with local custom rather than the usual form of oath or affirmation used in England and Wales. The VCF arranging party must make all appropriate prior inquiries and put in place all arrangements necessary to enable the oath or affirmation to be taken in accordance with any local custom. That party must be in a position to inform the court what those inquiries were, what their outcome was and what arrangements have been made. If the oath or affirmation can be administered in the manner normal in England and Wales, the VCF arranging party must arrange in advance to have the appropriate holy book at the remote site. The associate will normally administer the oath."

In recent years judges have become increasingly interventionist in ensuring that these provisions are complied with. The 2009 Special Commission of the Hague Conference on International Law concluded that the use of video-links and similar technologies to assist the taking of evidence abroad is consistent with the framework on the Hague Evidence Convention. For those states which have signed the Hague Convention on Taking of Evidence, their position as to the taking of evidence by video link for cases being heard in foreign states can be found on the HCCH website. For other countries, however, there is no substitute for enquiries made well in advance of the relevant authorities (made via the

Foreign Process Section at the Royal Courts of Justice - TOE.enquiries@fcdo.gov.uk). The Practice Note issued by the Chancellor of the High Court on 11th May 2021 requires a party calling a witness remotely to have obtained any necessary permissions either by the pre-trial review, if there is one, or by the time of filing the pre-trial check list if not, recording that it has been so obtained in the pre-trial check list, and this is likely to be considered to be good practice in all cases in the High Court or the County Court.

Don't be the party who omits to comply with the provisions, leading to an adjournment (with adverse costs), only to find out that the jurisdiction in question doesn't give permission, so having to run the case without witnesses and losing, incurring a second round of trial costs.

Even where it is possible for a witness to give evidence from a foreign jurisdiction, it should be borne in mind that there is no guarantee that the English courts will grant permission for him or her to do so; it is a matter for the court whether or not to grant permission in the exercise of its case management powers. In *Kimathi v Foreign & Commonwealth Office* [2015] EWHC 3684 (QB), for example, where several test claimants in group litigation were to be witnesses at trial, a dispute arose as to whether the evidence of some of them should be taken, not by deposition by a High Court judge in Kenya (accompanied by the parties' respective legal teams), but by video-link. Stewart J permitted some claimants to give evidence by video-link (in particular those agreed to be too unfit to travel), but required others to attend trial in person.

Conclusion

Witnesses whose first language is not English and witnesses located overseas can be heard in the English courts, and often are; but it is of the utmost importance when working with such witnesses that the provisions of the CPR are borne in mind. Failure to comply with CPR Part 32 can lead to the exclusion of their evidence, sometimes with catastrophic results. Practitioners failing to comply with these requirements can expect to be given short shrift by judges unsympathetic to ignorance of or disrespect for the rules. We have all been warned!

SPECIAL MEASURES

By Louise McCullough

Introduction

It is strange now to reflect on the fact that, until the passing of the *Youth Justice and Criminal Evidence Act 1999*, there were few, if any, adaptations to enable the young or otherwise vulnerable to give their evidence in the Criminal courts in England and Wales.

"The Bad Old Days"

Children (if indeed called as a witness) would be subject to the routine savage cross-examination as might be meted out on an adult witness of reasonable firmness. Victims of rape were routinely subject to humiliating questions about their behaviour, and clothing they were wearing at the time of the attack exhibited in open court. Vulnerable adults were no doubt not treated as witnesses within the criminal justice system at all.

Historically English law demanded that "even tiny children come to court for a live cross-examination if there is to be any chance of convicting a person who has abused them"[1] Critics argued that "demanding a child's evidence in this way" had a number of disadvantages. "The child was forced to relive a terrible, distressing incident in very stressful circumstances, and after lengthy delay that may have altered his or her memory. The defence may get little from the child and struggle to conduct a meaningful cross examination. And, given the fact that the child may not remember what happened and struggle to communicate even well-founded cases of this nature often had to be abandoned".

Evolution

With the advance in technology the capturing of a child's initial testimony on video tape became standard with cross-examination taking place over CCTV but the Pigot Committee in 1989 recommended more far ranging solutions including the recording of the whole of the child's evidence including cross examination taking place "out of court in advance".

Despite compelling arguments in favour of these developments progress implementing appropriate changes was slow and in 1998 "*The Children's Safeguards Review"* concluded that "the criminal justice system is not working in a way which protects children against abuse, with few convictions in relation to the cases investigated, and young children and disabled children being disadvantaged to the point of being deprived of justice. Also child witnesses may be further harmed by the court process. The Review recommends that Government implements the remaining recommendations of the Pigot Report; and undertakes a comprehensive review of the arrangements for prosecuting offences against children to make them more effective".

Youth Justice and Criminal Evidence Act 1999

The coming into force of the *Youth Justice and Criminal Evidence Act 1999* was a game changer in that safeguards were introduced for the first time to enable "vulnerable" or "intimidated" to provide their evidence with a range of "special measures". The definition of "vulnerable" witness are those eligible for assistance on the grounds of age (ie under 18) or "incapacity" (ie those suffering from a mental disorder or otherwise have an impairment of intelligence or social functioning). "Intimidated" witnesses are those eligible for assistance on the grounds of fear or distress about testifying.

The Rationale

Research indicated that the formalities of being questioned in a court room setting whether by the Prosecution or the Defence, especially with the Defendant being physically present were often detrimental to the quality of the witness's evidence. The introduction of "Special Measures" was intended to remove obstacles to the witness giving his/her "best evidence" and create a more appropriate environment for doing to.

ABE Interviews

Questioning by specially trained officers and recording of this as evidence in chief is standard for child witnesses, complainants in sexual cases and where identified early enough vulnerable adults. These video recorded or "Achieving Best Evidence" ("ABE") interviews permit the witness to give their account freely before clarifying questions refine the scope of the evidence. Experience shows that these interviews are of both variable quality and widely variable length (which is not always indicative of the seriousness of the offence nor complexity of the evidence). They are of course capable of being edited for admissibility and relevance and have the benefit of being captured nearer in time to the event/s alleged than the present.

Other Special Measures

A number of the special measures that have been implemented are so routine as to no longer be "special" but standard. These include the screening of the witness from the Defendant and less frequently screening the dock. Removal of wigs and gowns is routinely offered to child witnesses who routinely request that they be worn. Speaking to witnesses to settle them beforehand was a measure wholly deprecated for Prosecution Counsel in the past but is now routine, along with the Judge and often Defence Counsel in attendance in the witness care unit.

Registered Intermediaries

There has been an expansion in the use of communication aids such as the use of a Registered Intermediary ("RI") to facilitate communication – usually recommending the use of simplified forms of question often in an "open" format and usually checked with the "RI" in advance to ensure compliance with the "Ground Rules". A recent case I was instructed in for the Defence involved a witness with a speech impediment along with neuro-divergence typing their answers into a laptop and the RI reading the answers back to the court. This procedure enabled the witness to participate in the proceedings in a way that would otherwise have made their evidence well nigh impossible to receive. Other special measures include receiving from locations other than in the court building and have especial value for intimidated witnesses but also for those who are busy experts or who otherwise live a far distance from the Court.

Specialist Training

Specialist training is required for both Counsel and Judges who are instructed in vulnerable witness cases, which of themselves require a shift in the adversarial mindset.

Section 28 – A Mixed Blessing

A significant change has been the roll out nationally of the "Section 28 procedure" which allows for the pre-recording of cross examination in some cases many months before the trial can take place with the intention of allowing the witness to be cross-examined nearer to the event in question. Whilst well intentioned there have been a number of unanticipated downsides. The first is where the witness was ABE interviewed at the point of first complaint to the police but there has been significant delay before the matter is even charged. Accordingly the section 28 cross examination may take place several years later when all the benefits of a speedy procedure have been lost by the

passage of time. Secondly whilst section 28 cross examination is meant to take precedence over trial work there are many counsel who feel that the rigid nature of the timetabling of the procedure interferes with other work. Accordingly the number of Counsel willing to undertake a case involving Section 28 is reducing. Thirdly the pool of people willing to take RASSO (Rape and Serious Sexual Offences) work is diminishing accelerated by diversification of work by members of the Criminal Bar post pandemic and the perception (whether valid or not) that the financial renumeration for the work is inadequate leading to an increase in the rates albeit not leading to a significant shift in numbers of willing counsel. Finally and most worryingly research undertaken by Professor Cheryl Thomas at UCL shows a demonstrable decrease in the conviction rates where the complainant is an adult who has been the subject of pre-recorded cross examination. Judges often warn Prosecution Counsel of reduced conviction rates when an application for Section 28 is made in cases of that kind.

Special Measures Direction to the Jury

The Special Measures direction to the Jury makes it clear that the special measures are for the benefit of the witness testimony and are not a reflection on the Defendant in any way. Accordingly it is a mystery to me why any Defence Counsel would think it appropriate to challenge an application for any particular Special Measure which objectively speaking is reasonably made even more so where there is a statistically higher chance of an acquittal.

The Advocates Gateway

No discussion on this topic would be complete without signposting to the invaluable resource of "The Advocate's Gateway" which contains a number of "practical, accessible and research/ experience-led Toolkits" and set out best practice in vulnerable witness cases.

In Conclusion

Whilst not eliminating all of the issues which existed prior to the development of special measure, it is fair to say that implementation of special measures has allowed witnesses who would previously have been disqualified from participating meaningfully in the Criminal Justice process to be heard and that has to be a good thing.

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(1) Cambridge University Law Faculty 2011

BEST EVIDENCE: CARE PROCEEDINGS THE LOCAL PRACTICE NOTE—A SUITABLY UNSUBTLE KICK TOWARDS ACHIEVING BEST EVIDENCE

By Max Melsa

This piece is written, as far as possible, to be applicable to Advocates who represent local authorities, lay parties and children.

I come to writing this piece having just concluded a care proceedings case that reached week 151 and therefore approaching six times over the statutory period of 26 weeks[1]. The case was the oldest live case in the whole Court. The child had been subject to proceedings since birth and was about to turn three years old. The case had been subject to delays on many fronts, including issues of capacity of the mother, but most significantly delays caused by proposed alternative carers being put forward late, and challenges to subsequent negative assessments being made far too late.

The case as a whole is a primary example of why on 28th November 2024 Mr Justice MacDonald released the *Local Practice Note: Ensuring Adherence to the Public Law Outline in London*[2].

The contents of this Practice Note caused a great amount of debate between Advocates, particularly with the stark warning from *Re W* [3] that if case management directions were not complied with, this may be regarded as professional misconduct.

There has been a significant shift in the Courts following this Practice Note being released. An example of this is care proceedings commenced shortly after the Note was released where the Court effectively sent the parties back to the pre-proceedings stage. The Local Authority's case in support of interim public law orders was, to be frank, rather confused; in particular, it was not clear if the Local Authority were pursuing interim separation of a newborn child from the mother's care, a particularly difficult hurdle to overcome in light of the test set out in *Re C*[4]. Needless to say, the Local Authority had not obtained the best evidence available to them up to this point – there had been little thought to obtaining assessments, and insufficient planning prior to the child's birth as to potential options. The Court took the view that there was no necessity for interim public law orders and that much more could, and should, have been done under the PLO. Judge mentioned explicitly the renewed approach of the family courts following the Practice Note as part of their reasoning for refusing the Local Authority's application.

The Practice Note has given Advocates a route map to obtaining best evidence. The following key points arise:

1. **Make the most of the standard three hearings** – there are differing views as to the use by West London, and now East London, family courts of a proforma Case Management Hearing draft order. It is suggested that using these as a template for what instructions and what work needs to be done ahead of not just the Case Management Hearing, but the ICO hearing – regardless of whether you represent the Local Authority, lay party or child. Indeed, the Practice Note sets out that the Courts will now be amalgamating ICO applications with Case Management Hearings as part of their directions on allocation. You will need timescales for proposed assessments; instructions on whether HSTs are required and consented to; and names and contact details of proposed alternative carers, from the very beginning.

   Even if the proceedings are not in the East or West London family courts, the

contents of the proformas remain relevant – they can be a very useful tool.

For IRHs, if you have been able to get your client's case to a strong position, it should be considered as to whether the Court will be invited to make determinations or give indications as to specific issues, or even the case as a whole. Just because the parties are not in agreement, does not mean the case has to be managed towards a Final Hearing with all the issues remaining live. It has been observed that when issues are raised to be determined at IRH, that a Judge may be willing to, for example, indicate to a parent that in their view the best outcome for their child is the SGO proposed and that they would really struggle to overcome the negative parenting assessment and multiple positive HST results; or a social worker being informed that, despite clearly having thought about the case at great length, the test for separation of the child from the parents clearly not being met.

2. **Use Advocates' Meetings** – frequently, such meetings conclude and very little, if anything is discussed, or Advocates are not fully instructed for the meetings. These are without doubt missed opportunities to advance your client's case. In any event, the Practice Note now directs that a note of the meeting must be provided prior to the CMH.

   Much can be gained by Advocates properly discussing their respective positions before the day of a hearing, when of course the pressure has mounted – compromises are regularly found ahead of hearings, which can be the best outcome for your client (and most importantly, the child).

3. **Requirements of experts** – again, shortly after the Practice Note was released, a case came to Court where the key difficulty the mother had with caring for her children was her mental health. The Local Authority pursued a parenting assessment; Judge pointed out to the Local Authority that the mother's ability to safely care for her children was not an issue, so long as her mental health was stable. A parenting assessment was therefore not directed. This demonstrates the shift in the Court's approach to experts, particularly following the case of *London Borough of Enfield v E (Unconscionable Delay)*[5] . Sometimes, achieving best evidence for your client may be far simpler than initially thought.

4. **Intermediaries** – there has been a real shift away from the use of intermediaries. On one side, you can have an intermediary enter a case and take a parent from someone just about able to give one or two-word answers to questions asked of them; to someone who, through the use of recaps and pictorial aids and diagrams, give stellar evidence. On the other side, intermediaries have been seen to fail to intervene when a parent was clearly not understanding what was being asked of them and not follow their own assessment.

   When it comes to achieving best evidence, Advocates need to identify if their client requires an intermediary at the very earliest opportunity. Ideally, continuity of the intermediary can be absolutely key; in contrast, if Advocates are not content that the intermediary assigned is following the recommendations of the assessment received, it may be that a new intermediary should be requested.

   The cases of *West Northamptonshire Council v KA & Ors*[6] and *West Northamptonshire Council v The Mother (Psychological Assessments)*[7] are essential reading as to the Court's approach.

[1] Section 32(1)(a) Children Act 1989
[2] https://www.judiciary.uk/wp-content/uploads/2024/11/Local-Practice-Note-Getting-Back-to-the-PLO-in-London-Final-28.11.2024-1.pdf
[3] *(A Child)(Adoption Order: Leave to Oppose); Re H (A Child)(Adoption Order)(Leave to Oppose)* [2013] EWCA Civ 1177, [2014] 1 FLR 1266
[4] *(A Child) (Interim Separation)* [2019] EWCA Civ 1998
[5] [2024] EWFC 183
[6] [2024] EWHC 79
[7] [2024] EWHC 395

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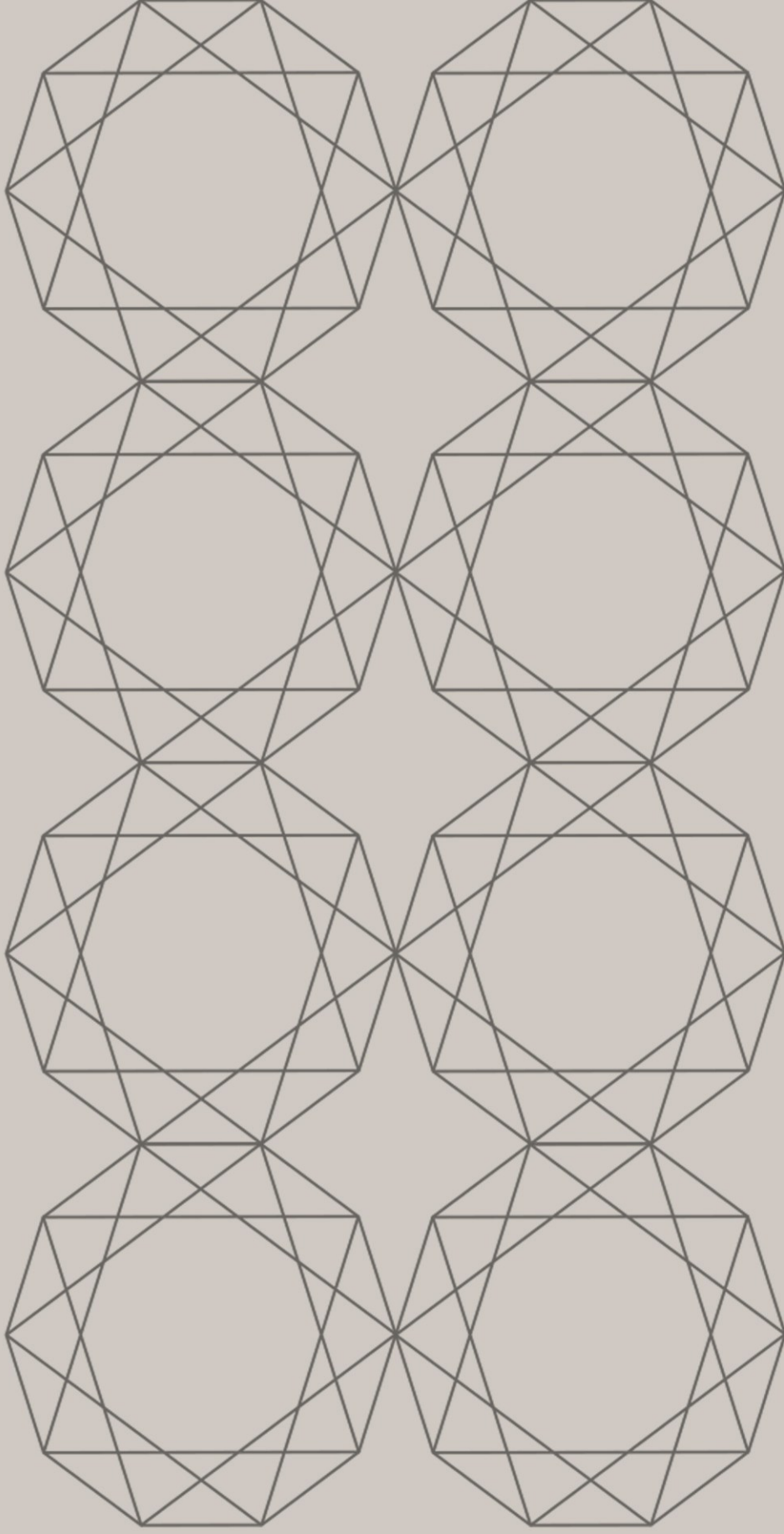

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