

TRANSLATORS' AND INTERPRETERS' FEES AND LANGUAGE TO BE USED

Practice Direction 18.1 states that 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...".

Likewise, by virtue of Practice Direction 32, Paragraph 20.1 the Statement of Truth must be in the witness's own language.

The Witness Statement must state the process by which it has been prepared, for example by a face-to-face meeting, or over the telephone and/or through an interpreter – Paragraph 18.1(5).

Paragraph 23.2 reads:

"(a) the party wishing to rely on it must—

(i) have it translated; and

(ii) file the foreign language witness statement with the court; and

(b) the translator must sign the original statement and must certify that the translation is accurate."

The wording of the Practice Direction raises the issue of whether CPR 32 and the Practice Direction itself apply not only to those whose English is not good enough to give evidence and deal with litigation, but to everyone whose first language is not English, even if they speak English far better than their own language.

That issue arose in

Muhammad v Liverpool Victoria Insurance Company Limited (unreported, Manchester County Court, HHJ Evans, 1st April 2022)

and I am grateful to Chris Middleton of Oriel Chambers who represented the defendant in that matter, for information from his website.

Chris will be writing a detailed piece for this Newsletter on the subject.

In that case, the claimant sought damages for Whiplash type injuries arising from a Road Traffic Accident, and the defendant put him to proof of causation generally, but also pleaded several inconsistencies in the claimant's evidence.

The claimant served a Witness Statement in English and the matter proceeded to trial, and at the beginning of the hearing, the Judge raised the question of whether the claimant's first language was English.

In fact, it was Urdu, but the claimant's counsel advised the court that the client spoke and understood English well.

The trial Judge, a Circuit Judge, stated that if the claimant's first language was not English, then the

Rule and Practice Direction applied, and consequently, the Circuit Judge excluded the claimant's statement.

The Judge expressed the view that even someone who speaks good English on a day to day basis is not expressing themselves in one's own language, and that in any event, the key feature of the overriding objective was compliance with Rules, Directions and Orders and that trials were heard day-in and day-out where Practice Direction 32 had not been complied with, and the only way to secure compliance was to impose sanctions.

The Judge refused to admit the evidence of the claimant in English and refused an adjournment to correct the defects in the statement, and thus dismissed the claim and awarded costs against the claimant and made a "show cause" order against the solicitor.

Practice Direction 32, Paragraph 18.1, specifically refers to "their own language", and that could be interpreted by other Judges in a way that English could be someone's own language, even if it was not the first language that that witness had spoken.

Practice Direction 57, dealing with work in the Business and Property Courts has a very different provision, which, on the face of it, whilst purporting to reinforce Practice Direction 32 seems fundamentally to disagree with it, and certainly to disagree with the decision in the case set out above.

Practice Direction 57 specifically states that the witness's 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 the witness's first or native language. (My bold).

That makes sense, as otherwise a witness could be in the absurd position of having lived in England for 40 years and being far more fluent in English than in their first or native language, having to give evidence poorly, when they speak perfect English.

It seems to me that that principle must apply to all proceedings and that the Circuit Judge in Manchester got this wrong.

The Circuit Judge's decision there raises a fascinating, but real issue, which would apply to many of our Judges.

A child is brought up in England and that child's first language is not English, but they attend an English-speaking school in England and qualify as a solicitor or barrister and become a Judge.

There are many of our judiciary in that position.

Does that Judge, conducting the proceedings in English of course, then have to tell a witness, who let us say by chance was his English Professor at University, but for whom English was not her/his first language, that she/he must give evidence in, for example Urdu?

The decision in Manchester County Court requires early clarification from the Court of Appeal.

If the Rule is to be interpreted in that way, then it discriminates against people of certain ethnic origins, and is unlawful and can be struck down by the Senior Courts under the Human Rights Act.

Very clearly, a pool of people, all of whom have perfect English, but where people who have non-UK ethnicity have their cases dismissed, is a form of discrimination which has no place in the courts of this country.

As Chris Middleton states:

"If, however, other judges take a similar approach in these situations... it seems unlikely that the evidence of a witness whose first language is not English will be admitted, no matter how competent in English they are."

The whole thing is absurd.

We are all very familiar with people for whom English **is** their first language, who have trouble reading and writing, and yet their written Witness Statements are admissible, but the written statement of a professor of English is potentially inadmissible because they happen to have spoken a few words of Hindi at home when they were babies.

Chris Middleton again:

"However, this difficulty pales into insignificance next to the obligations which will arise with every witness, whose first language is not English, to employ a translator to help take a witness statement from any witness whose first language is not English; employ a translator to translate the original witness statement into English; and (as it is difficult to see how the reasons HHJ Evans set out for requiring a witness statement to be taken in a party's first language would not apply at least as strongly to the witness' oral evidence) employ a translator at trial."

To add insult to injury, the costs of interpretation and translation are not recoverable in Fixed Recoverable Costs cases.

That was the decision of the Court of Appeal in

[Aldred v Cham \[2019\] EWCA Civ 1780](#),

and although that case was dealing with the cost of counsel's advice on quantum in an infant approval matter, the Court of Appeal made it crystal clear that the same principle applied to translation costs.

It said that the fact that someone could not speak English, as with the fact that a claimant was a child, was not something that arose out of a particular feature of the dispute.

The point made by the Court of Appeal was that the additional cost was occasioned by the claimant's status, and not by "a particular feature of the dispute" which is the wording in the Civil Procedure Rules.

Outside the field of Fixed Recoverable Costs, it is a matter for the discretion of the court, as with costs matters generally.

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It has now been confirmed that the Extension of Fixed Recoverable Costs will be implemented in October 2023, and it will be interesting to see if that rule is maintained, bearing in mind that virtually all civil litigation valued at £100,000 or less and not just personal injury claims, will now be covered by Fixed Recoverable Costs.

Clearly the Rule, and the interpretation of the Court of Appeal as to the non-recoverability of costs in Fixed Recoverable Costs cases restricts access to justice.

Solicitors are entitled to charge the client for that unrecoverable disbursement if that is made clear in the retainer at the outset. Firms need to make a policy decision as to whether they wish to include any such fee payable by the client within any overall cap on damages to be charged to the client or have it as a separate, additional, sum that the client must pay, and which is not included in any capped percentage.