ATLANTIC CHAMBERS

PERSONAL INJURY LITIGATION AND THE NON-ENGLISH SPEAKING CLIENT

By Justin Valentine

There are few specific provisions in the CPR dealing with non-English speaking parties and witnesses. This is surprising considering the regularity with which non-English speakers give evidence and there is a lack of consistency in the formalities that solicitors believe are required and that the Courts impose.

By CPR 22.1(1) statements of case and witness statements must be verified by a statement of truth. By CPR 22.1(6) a statement of case can be signed by the party or the legal representative but in the case of a witness statement, the maker of the statement must sign the witness statement.

In relation to a statement of case there are no formalities to be satisfied in relation to what, if anything, was read out to the party or who undertook the translation of the statement of case, if anybody. Contradictions between statements of case, witness statements and oral evidence are fertile ground for cross examination at trial where there are disputed issues of fact. It is therefore wise to ensure that no such contradictions arise.

Translation may be provided by a foreign-language speaking solicitor. Such practice is in general unobjectionable, and in any event probably inevitable, but may cause problems if the client gives evidence that he told the solicitor something other than subsequently appears in the statement of case. In such a case a solicitor may then be called to explain the contradiction though it would be unwise for counsel to allow the solicitor to be cross examined on his statement.

Less satisfactory is translation by claims managers. Especially in claims involving credit hire, claims managers may have their own views as to how the litigation should be run and their focus may be on the recovery of their own damages rather than the best interests of the client. It is unfortunately the case that clients may be treated as profit-earning chattels for such companies to the detriment of their own more modest claim and their credibility if liability is in issue.

Equally unsatisfactory is translation by family members whose ability to undertake complex translation is unclear and whose understanding of the importance of the process may be imperfect.

Ideally translation should be provided at all stages by independent professional interpreters. The cost of independent translation is recoverable as a disbursement. It would otherwise be unprofitable to bring a case with a non-English speaking client and possibly a breach of Article 6 of the European Convention on Human Rights, Right to a Fair Hearing. Although not binding the case of *Madej v Maciszyn*, Master Campbell 29th November 2013 is persuasive authority that even in a portal case translation fees are recoverable as a particular feature of the dispute; CPR 45.12(c).

CPR PD 22.3A provides that "*Where a document containing a statement of truth is to be signed by a person who is unable to read or sign the document, it must contain a certificate made by an authorised person*". That provision does not apply to a foreign-language speaker but to someone who is physically unable to read or is illiterate hence reference to the person making his mark in the presence of the authorised person in PD 22.3A.3. The certificate to be used refers to reading the contents of the document not translating it. Further, the authorised person need not be independent which would be a curious anomaly as the party's own solicitor would be able to endorse the statement. A solicitor would not be permitted to provide translation services at Court so it is unclear why he should be permitted to translate the witness statement.

CPR PD 32.18 provides that a witness statement must be in the intended witness's own words. This means in his own language. See, for example, *In Re Phoneer* [2002] 2 BCLC 241 where HHJ Kaye QC (sitting as a Deputy Judge of the High Court) held:

> *A witness statement must comply with the relevant Practice Direction: see Rule 32.8. The relevant Practice Direction to Part 32 of the Civil Procedure Rules requires that a witness statement must, if practicable, be in the witness's own words: see paragraph 18.1. The obvious consequence is that, if the witness does not speak English, 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 paragraph 23.*

There is a case on Westlaw, *Mohamad v Bay* V, 22nd May 2014, District Judge Thompson, where the claimant's case was struck out for failure to comply with CPR PD 22.3A. District Judge Thompson does not appear to have been referred to *In Re Phoneer* and the case is, it is suggested, wrongly decided.

The *In Re Phoneer* approach was endorsed by HHJ Gore QC in *Hussan v Naqui*, 3rd April 2014 where on an application to strike the Claimant's case out on failure to comply with CPR PD 22.3A the judge ordered:

1. *The Claimant shall serve fresh witness statements from the Claimant and any witness who cannot understand English, which statements shall be written in a language that they can understand. Each statement shall:*

   (a) *be accompanied by a translation of the foreign language witness statement into English, and*

   (b) *be accompanied by a statement from the translator verifying the translation and exhibiting both the translation and a copy of the foreign language witness statement.*

Notwithstanding the above this practice is rarely complied with in personal injury litigation. HHJ Gore QC expressed the view that the rules were crystal clear, ie "*in his own words*" means in his language. The procedure for the endorsement of a disclosure statement, which should be endorsed by the client himself, is unclear and

HHJ Gore QC declined to make a finding on that issue. Presumably it should also be translated.

The requirement for properly translated witness evidence receives, it is suggested, insufficient emphasis. Judges regularly comment upon a change of evidence between a party's witness evidence and his evidence at Court when giving judgment. The precision required for properly formulated witness evidence is best achieved with the assistance of an independent, professional translator.

There is also a tendency to criticise witnesses who give evidence through a translator when it appears they have some grasp on English. Though there may be situations where use of the interpreter is tactical, in general such criticism demonstrates a failure to appreciate the differing levels of mastery of a language.

Consider, for example, the levels of language as endorsed by the Common European Framework of Reference for Languages:

Level group	Level group name	Level	Level name	Description
A	Basic user	A1	Breakthrough or beginner	Can understand and use familiar everyday expressions and very basic phrases aimed at the satisfaction of needs of a concrete type. Can introduce him/herself and others and can ask and answer questions about personal details such as where he/she lives, people he/she knows and things he/she has. Can interact in a simple way provided the other person talks slowly and clearly and is prepared to help.
		A2	Way stage or elementary	Can understand sentences and frequently used expressions related to areas of most immediate relevance (e.g. very basic personal and family information, shopping, local geography, employment). Can communicate in simple and routine tasks requiring a simple and direct exchange of information on familiar and routine matters. Can describe in simple terms aspects of his/her background, immediate environment and matters in areas of immediate need.

B	**Independent user**	**B1**	**Threshold or intermediate**	Can understand the main points of clear standard input on familiar matters regularly encountered in work, school, leisure, etc. Can deal with most situations likely to arise while travelling in an area where the language is spoken. Can produce simple connected text on topics that are familiar or of personal interest. Can describe experiences and events, dreams, hopes and ambitions and briefly give reasons and explanations for opinions and plans.
		B2	**Vantage or upper intermediate**	Can understand the main ideas of complex text on both concrete and abstract topics, including technical discussions in his/her field of specialization. Can interact with a degree of fluency and spontaneity that makes regular interaction with native speakers quite possible without strain for either party. Can produce clear, detailed text on a wide range of subjects and explain a viewpoint on a topical issue giving the advantages and disadvantages of various options.
C	**Proficient user**	**C1**	**Effective operational proficiency or advanced**	Can understand a wide range of demanding, longer texts, and recognize implicit meaning. Can express ideas fluently and spontaneously without much obvious searching for expressions. Can use language flexibly and effectively for social, academic and professional purposes. Can produce clear, well-structured, detailed text on complex subjects, showing controlled use of organizational patterns, connectors and cohesive devices.
		C2	**Mastery or proficiency**	Can understand with ease virtually everything heard or read. Can summarize information from different spoken and written sources, reconstructing arguments and accounts in a coherent presentation. Can express him/herself spontaneously, very fluently and precisely, differentiating finer shades of meaning even in the most complex situations.

That a witness may have an A2 grasp of English, able, for instance to "communicate in simple and routine tasks requiring a simple and direct exchange of information on familiar and routine matters" does not demonstrate an ability to respond to questions at trial which are typically grammatically complex, asked by educated lawyers and which often contain non-typical technical language both related to the subject matter at issue and the procedural context. A witness may be able to give a

straightforward answer as to where he was going or what he was doing but may struggle with questions, as are typical at trials, dealing with the development of his case and contradictions arising between different witnesses and the various documents forming the trial material. Witnesses are too readily criticised for reliance on interpreters and there is little appreciation of the difference between levels of understanding between non-English speakers. As such criticism affects foreigners only this may constitute indirect racism.

According to Cambridge English Language Assessment each level is reached with the following guided learning hours: A2, 180–200 hours; B1, 350–400 hours; B2, 500–600 hours; C1, 700–800 hours, and C2, 1,000–1,200 hours. This illustrates the gulf between learners of different levels of competency.

In order to overcome such criticism it is suggested that witness statements should specifically address the level of English that the maker of the statement has achieved, whether he has had any formal training in English and in what contexts he uses English. There is also a need for further guidance from the higher courts as to the procedure to be adopted when dealing with non-English speaking clients.

JUSTIN VALENTINE

Atlantic Chambers,
4 – 6 Cook Street,
Liverpool, L2 9QU