**Civil Justice Council**

**Vulnerable Witnesses and Parties Within Civil Proceedings: Current Position and Recommendations for Change**

**A response by the Association of Personal Injury Lawyers**

**October 2019**

## Introduction

APIL welcomes the opportunity to respond to the Civil Justice Council's consultation on vulnerable witnesses and parties within civil proceedings. We agree with the recommendations set out in the consultation, and believe that they will ensure that vulnerable people are able to participate fully in the civil justice process. There must, however, be full consideration of how vulnerable litigants in person will be supported, to ensure that they receive the same access as those who are represented.

### Q1) Are there issues in relation to vulnerable parties/witnesses in the civil courts that have not been covered/adequately covered within this preliminary report? If so, please give relevant details

*Definition of vulnerability*

We note that there is no consideration of a definition of vulnerability in the paper. Given the current tide of legal reform, there is likely to be an increase in litigants in person using the civil court system. As a result, there will be fewer people who will be in a position of knowledge and experience to identify that a party may be vulnerable and would benefit from additional support. Without additional thought as to how a litigant in person could be identified as vulnerable, the effect of any changes to the rules to ensure that vulnerability is flagged up at the earliest opportunity will be tempered. A vulnerable person who has a legal representative will be able to rely on that legal representative to flag up vulnerability in the directions' questionnaire. A vulnerable litigant in person, however, may not be able to identify themselves as vulnerable. There should be a broad discretion for the judge to consider whether a party or witness is vulnerable – for example the Civil Procedure Rules could incorporate similar wording to the Family Procedure Rules 3A.4 and 3A.5. These sections provide that the court must consider whether a party's participation in proceedings (other than by way of giving evidence), or the quality of evidence given, is likely to be diminished by reason of vulnerability.[1]

[1] https://www.justice.gov.uk/courts/procedure-rules/family/parts/part-3a-vulnerable-persons-participation-in-proceedings-and-giving-evidence

A broad discretion for the judge to assess whether a person is vulnerable should be accompanied by guidance in an accompanying Practice Direction, for all parties in the process to highlight what "vulnerability" will entail, and to raise awareness that a vulnerable litigant in person will not necessarily recognise themselves as such. This guidance cannot and should not be all encompassing, but it should provide sufficient detail and examples to enable all parties involved to be able to recognise and flag up the vulnerability of a litigant in person, should they be unable to do so themselves. The Criminal Practice Directions Division I 3D sets out that "vulnerable" "includes those under 18 years of age, people with a mental disorder, learning disability, physical disorder or disability, or who are likely to suffer fear or distress in giving evidence." There must be caution that the guidance is not too narrow, and parties and the courts should have an open mind as to what is classed as vulnerable, but the Criminal Practice Direction wording could be a starting point for parties in civil proceedings[2]. The list at 3A.7 of the Family Procedure Rules[3] should also be a reference point for what "vulnerability" includes. There should also be accessible guidance available to litigants in person, to help them recognise whether they are vulnerable – this must be in plain language.

Paragraph 36 of the Civil Justice Council's report states that "in the civil and family courts, evidence in chief is provided to the Court in statement form, which is read in advance and the witness does not usually have to repeat it; merely confirm that the content of the statement is true. As a result, the practice of providing pre-recorded evidence for vulnerable witnesses would ordinarily be of little additional assistance to a witness in a civil or family case." We also note at paragraph 135 of the consultation that video recorded evidence in chief is not listed as a potential power/practice in either the civil or family courts. We suggest that while it may not be common practice for evidence in chief to need to be recorded, it would be helpful if judges in the civil courts had this as an option to offer vulnerable witnesses and parties. It is odd that something that would potentially assist vulnerable witnesses and parties – some may find it far more helpful to record their evidence, rather than provide a written version, for example – is dismissed outright.

*Costs*

There must be changes to fixed costs (both in lower value cases and any extended fixed costs regime that is planned) and costs budgeting rules to reflect the necessary extra work that will be required in ensuring that vulnerable parties and witnesses can access the civil justice system fully. There is no costs budgeting in cases involving children, as it is recognised that children are vulnerable and extra work is required to ensure that their case is resolved fairly. There should be recognition of the additional work that is required in cases involving vulnerable adults, also. Currently, there is a discretion to disapply costs budgeting rules in adult brain injury cases, but this is not widely used.

It is particularly important that the rules around fixed costs are changed to reflect the necessary additional work that will be required in assisting vulnerable witnesses, given the strict application of CPR 45.29J[4]. CPR 45.29J provides that the court will consider a claim

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[2] https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/crim-practice-directions-I-general-matters-2015.pdf

[3] https://www.justice.gov.uk/courts/procedure-rules/family/parts/part-3a-vulnerable-persons-participation-in-proceedings-and-giving-evidence

[4] (1) If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in rules 45.29B to 45.29H

greater than fixed recoverable costs only if it considers that there are “exceptional circumstances” making it appropriate to do so. Case law demonstrates that “exceptional circumstances” is a very high bar – see *Ferri v Gill*[5], where the High Court held that it was not enough that the case was “outside of the general run” of cases falling within the Road Traffic Accident portal. In *Hislop v Perde*[6], Coulson LJ that: "It goes without saying that a test requiring "exceptional circumstances" is already a high one". It is unlikely on this interpretation, that claimant representatives will be able to argue generally in cases where there is a vulnerable client that fixed costs should be disapplied. Therefore, there must be amendments built into the fixed costs rules to allow for the extra work required in cases of vulnerable claimants.

**Q2) Do you agree with the proposed recommendations set out at section 7? If not why not?**

We welcome the recommendations set out at section 7 of the consultation. As is evident from the consultation, there are many provisions open to the courts at present to help assist vulnerable witnesses and parties to give their best evidence. However, because there is no duty to consider the vulnerability of parties or witnesses, any support that is put in place is done so on an inconsistent and ad hoc basis. A particular issue is that district judges are keen not to tie the hands of the trial judge. This often means that in the county court, decisions on additional measures to accommodate witnesses are made on the day of trial – which causes further anxiety and exacerbates issues. Further, members report that there is resistance from defendants to requests for assistance for the vulnerable party, and because there is no general duty to consider whether a party is vulnerable, the court does not have a duty to ensure that measures to support the vulnerable party are in place. We welcome the suggestion that there should be rule changes and amendments to the directions’ questionnaires so that the attention of judges, parties and advocates is focused on identifying vulnerability, so that the measures within the rules that already exist can be put in place where needed. The directions questionnaire should allow the parties to provide details about the type of vulnerability, to allow the court to ensure that the most useful adaptations can be put in place.

It is clear that a cultural shift is needed, with all parties becoming more aware and more amenable to helping vulnerable parties and witnesses to give their best evidence. This can only begin once there is a change to the Civil Procedure Rules. The requirement to consider vulnerability as part of the directions’ questionnaire will concentrate minds and ensure that the issue is be dealt with by the court as a priority.

*Training for civil judges*

We support this recommendation. Training of all civil judges will ensure that vulnerable parties will be able to access assistance where needed. Training will also assist in ensuring that litigants in person do not “fall through the gaps” because they have not got a legal representative to recognise that they are vulnerable. If judges are trained on detecting and assessing vulnerability, they should be able to assist the party, even if the party has not themselves applied for adaptations. We also suggest that this recommendation could be extended further, to ensure that where possible, cases where there is a vulnerable party are

[5] [2019] EWHC 952 (QB**)**

[6] [2018] EWCA Civ 1726

heard by judges who have been specifically trained in the conduct of hearings involving vulnerable parties.

In order to ensure that litigants in person who are vulnerable obtain the support they need, there should be training of all individuals that a litigant in person is likely to come into contact with during the life of their claim – judges, court staff, lawyers representing the parties. If those people are trained to recognise vulnerability, this will ensure the litigant in person obtains the assistance they need.

*Intermediaries*

We welcome this recommendation. There must be clear information on how intermediaries are to be funded in the civil process. We suggest that if the claimant is successful, the defendant should have to pay the costs of instructing the intermediary. Intermediaries should be funded in the same manner as interpreters and translators, for example.

*Court protocols and Guidance*

We welcome this recommendation, and support tailored protocols for each court as to how they can support vulnerable parties/witnesses. Each protocol must be written in such a way, and available in a variety of formats, so that is accessible to vulnerable parties. There is a resource issue, and some courts will find it more difficult than others to provide support, due to the facilities available within the court building – this must be acknowledged and rectified by the Ministry of Justice. There should not be a "postcode lottery", whereby someone who lives in a particular area is unable to access the full support that they need in a case, because they happen to live somewhere where the court facilities are unable to provide that support. The Ministry of Justice should review the court estate and consider each court's capability to provide for and offer the services highlighted at points (a) – (d) of paragraph 179 of the consultation. If court is found lacking, resources should be made available to rectify this.

*Staff training*

We welcome this recommendation. As above, the training of all parties involved in the process – judges, court staff, and lawyers representing parties, will ensure that litigants in person do not "fall through the gaps".

*Compensation orders*

We question the inclusion of this recommendation, and whether this issue falls within the remit of the Civil Justice Council's review. Criminal Compensation Orders should not be used as a justification for vulnerable people having a lesser ability to access the civil courts. Compensation Orders are not a substitute for civil compensation, and often, as the criminal courts must take into account the means of the defendant when deciding the level of the order, the amount is far lower than would be awarded in the civil courts. Compensation Orders are a separate issue, and should not be considered as part of this piece of work.

**Q3) Do you believe that there should be further or alternative recommendations? If so, please set out relevant details**

There is consideration in this report about defendants cross examining claimants[7], and the protections needed here. We believe that the current balance is correct - where there is a vulnerable witness or self-represented defendant, the judge should put the case to the

[7] Paragraphs 99 -102 of the consultation

witness, following the guidance of Hayden J in *PS v BD*[8], approved and applied in the civil hearing of *LX & BXL v Wilcox and Wilcox*[9], a case involving historic sexual abuse.

**About APIL**

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has worked for almost 30 years to help injured people gain the access to justice they need, and to which they are entitled. We have more than 3,000 members who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives, paralegals and some academics.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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[8] [2018] EWHC 1987 (Fam)
[9] [2018] EWHC 2256 (QB)