

Special measures: enabling vulnerable individuals to give the best evidence possible

Why can't witnesses and parties in personal injury cases be afforded the same support as those in criminal and family cases, asks *Jonathan Wheeler*



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Why is it that my clients receive less favourable treatment when going to court, than they would if they were appearing in the criminal or family courts? Vulnerable parties and witnesses have long suffered a disservice in their treatment at the hands of an often unhelpful and unfriendly civil justice system.

The criminal courts are well used to applying special measures for vulnerable witnesses, on a statutory footing since the passing of the Youth Justice and Criminal Evidence Act 1999. This includes screening them from the defendant when giving evidence, giving evidence by video link, or in private, using an intermediary to facilitate communication, the removal of wigs and gowns, and prohibiting cross-examination of a victim of a sexual offence by their alleged perpetrator.

The Family Procedure Rules have been amended to facilitate such special measures too and last month the government published its long awaited Domestic Abuse Bill. One of its measures fulfils a government promise from February 2017 to end the cross-examination of domestic violence victims by their abusive ex-partners. This measure is overdue of course, and – like the criminal justice system – aims to put such protective or special measures on a statutory footing. The bill proposes that a judge can appoint a lawyer to put questions in cross-examination to a witness / victim in place of the alleged perpetrator, who is otherwise a litigant in person. The impact assessment accompanying the bill estimates this will cost taxpayers £8m annually.

There is no such protection in the civil courts. Instead we have to navigate a mish-mash of rules and regulations on behalf of our clients, which are consistently mis-applied; often short-shrift is given to any particular difficulties our clients may have when attempting to give their evidence in court. Claimant personal injury and medical negligence lawyers representing injured, damaged, often mentally broken people may be frustrated. But defendants too are often vulnerable, as are witnesses to the facts.

VICIOUS CROSS-EXAMINATION

I have seen first-hand vicious cross-examination of vulnerable clients (by counsel) in which the judge has failed to intervene. I know of compensation cases where the convicted paedophile has been allowed to cross-examine my client directly. I have witnessed a judge putting two vulnerable clients (victims of child sexual abuse by their teacher) through the agony of describing what they went through, even though defence counsel rose to his feet to explain that my clients' evidence on the issue was accepted. The judge then peppered my clients' testimony with inappropriate asides belittling their experiences. I have personal experience of clients taking a low offer (against my advice) in order to avoid the trauma of having to give evidence in court.

As civil litigators, we can only rely on rather vague rules to put in place special measures at trial: One must rely on the overriding objective in the Civil Procedure Rules for the court to deal with cases justly (CPR 1.1 (1)), its powers of case management (CPR 1.4), and the ability to depart from the rule that witnesses give oral evidence in court in exceptional circumstances (CPR 3.1(2) (m), CPR 32.3 and 34.8 (evidence by deposition)). I have known judges to allow the use of screens and evidence by video-link from a separate room within the court building (where such facilities exist). In one personal injury claim, *Connor v Castle Cement & Ors* [2016] EWHC 300 (QB), the court allowed the claimant to use an intermediary to facilitate the giving of his evidence, as he suffered from a chronic psychological condition akin to dementia.

VULNERABLE PARTIES' TOOLKIT

Many psychiatrists believe that the stress of litigation prolongs trauma. As a solicitor whose mission is to help my clients overcome their difficulties, this is difficult to accept. The point is that our clients, and defendants and witnesses may be vulnerable in ways which are not obvious. We must do more to make the system work, and this starts from day one. The Advocates Gateway has made



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available a toolkit for those in the civil justice system dealing with vulnerable parties since 2015. This deals with ways to identify vulnerability, how to engage vulnerable clients in the process, obtain their best evidence in the way they are questioned for the taking of witness statements for example, as well as measures that can be requested for when the client gives evidence in court. We need a codified – and preferably statutory – set of rules for the civil courts to apply. Whether witnesses require special measures should be asked in the directions questionnaire, and the court when first seized of the case at the initial case management conference (CMC) should be dealing with this. The Association of Personal Injury Lawyers (under my tenure as president in 2015-16) attempted to lobby the Civil Procedure Rules Committee on this very topic – to no avail.

In its interim report of April 2018, the Independent Inquiry into Child Sexual Abuse recommended that the same protections afforded to vulnerable witnesses in criminal cases be afforded to victims and survivors of sexual abuse claiming compensation in the civil courts. The Ministry of Justice has seemingly taken this on board, and the Civil Justice Council has embarked on a fact-finding mission to consult the profession with APIL's help. I am watching this space.

In the meantime, what can be done to identify vulnerable parties or witnesses, and put in place measures to help them? As a starting point, I would urge all practitioners in the field to read Toolkit I7 produced by The Advocates Gateway: "Vulnerable witnesses and parties in the civil courts" (disclosure of interest: co-authored by the author). The gateway is a great resource for any advocate, and their other toolkits also give specific recommendations on how to take evidence from clients or cross-examine witnesses who may have a broad range of vulnerabilities – children, deaf people, people with autism, or those who have trouble with the English language, for example. Once you have recognised your client's vulnerabilities, if these are going to be a barrier to them giving evidence, raise this with the court at the first CMC. The procedural judge should be referred to those parts in the CPRs which arguably give them a wide discretion to make an order to take such measures to help them, although a creative application of the rules may be required.

CINDERELLA JUSTICE

As a judge of the commercial court, I am not sure whether Lord Justice Gross has any



great experience of personal injury litigation. But in his annual lecture last month to the London Common Law and Commercial Bar Association a lot of what he said chimed with me as a personal injury litigator. He spoke of the importance of civil justice in upholding the rule of law. He bemoaned the fact that the state sees civil justice as "a Cinderella", lower in priority than the criminal and family courts, even though to a great extent it funds them:

"This acute problem, repeatedly observed by members of the senior Judiciary over the past decade, rests on a failure to fully appreciate that the provision of an accessible and effective civil justice system is an integral part of the delivery of one of the State's primary duties: the provision of an effective means through which law and justice can be upheld – a system which enables litigants to vindicate and enforce their legal rights."

Government cut-backs have pared back provision for special measures. Currently, family judges cannot direct that public funds be used to facilitate them and, in the words of Professor Penny Cooper, "if there is no money, there are no measures". The Domestic Abuse Bill intends in part to tackle that. However a lack of public resources need not be a barrier in civil claims, as surely the losing party should pay for the measures reasonably required by the court as part and parcel of the inter partes costs regime.

The state must be prevailed upon to facilitate a civil justice system which can be accessed by all, allowing anyone and everyone a fair chance to enforce their rights, or properly defend themselves and their reputation; above all, a justice system which allows all witnesses an opportunity to give their best evidence. ⁵¹



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