



An introduction to vulnerable witnesses in the civil courts and tribunals

Isabel Baylis

1

To be covered
in this
seminar

-
1. Why this topic is important
 2. Definitions of 'vulnerable witness'
 3. Powers of the court/tribunal as regards vulnerable witnesses
 4. Examples in case law
 5. Tips on reacting proactively to vulnerable witnesses

2

Why is this important

- Access to justice
- Shifting priorities within the court system: recent consultation and changes to the CPR
- Efficiency
- Getting the best evidence
- Getting the judge onside
- Maintaining control of the case and its progress

3

Definitions of 'vulnerable witness'

Key definitions for civil/employment procedure can be found:

- Practice Direction 1A. Amendment included in the 2021 CPR.
Relevant section “the overriding objective”.
- Employment Tribunals Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal Proceedings

4

CPR Practice direction 1A

3.

A person should be considered as vulnerable when a factor—which could be personal or situational, permanent or temporary—may adversely affect their participation in proceedings or the giving of evidence.

4.

Factors which may cause vulnerability in a party or witness include (but are not limited to)—

- i. Age, immaturity or lack of understanding;
- ii. Communication or language difficulties (including literacy);
- iii. Physical disability or impairment, or health condition;
- iv. Mental health condition or significant impairment of any aspect of their intelligence or social functioning (including learning difficulties);
- v. The impact on them of the subject matter of, or facts relevant to, the case (an example being having witnessed a traumatic event relating to the case);
- vi. Their relationship with a party or witness (examples being sexual assault, domestic abuse or intimidation (actual or perceived));
- vii. Social, domestic or cultural circumstances.

5

CPR Practice direction 1A continued

5.

When considering whether a factor may adversely affect the ability of a party or witness to participate in proceedings and/or give evidence, the court should consider their ability to—

- (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 representative/s (if any) before, during and after the hearing; and
- (f) attend any hearing.

6

Employment tribunals: presidential guidance

9. As in the civil justice system, vulnerable parties and witnesses in Employment Tribunal proceedings are not a homogenous group. Mental or physical disability and intellectual or social disadvantage can be obvious barriers to access to justice in employment litigation.² Some Employment Tribunal litigants are vulnerable because of the nature of the adversarial proceedings in which they are engaged. They may be fearful of intimidation or reprisal. Some parties or witnesses may react adversely to the presence of another party or witness in the hearing room.
10. As the Civil Justice Council recognises, vulnerability can be internalised or be a reaction to the litigation process itself. It may be generalised or situational, permanent or temporary, or a mixture.

7

Key points from definitions

Vulnerability is defined by outcome rather than a particular characteristic or circumstance: it depends on an individual's ability to give evidence and participate in proceedings

Key flags to look out for regarding characteristics would be disability, age and language barriers. However, not every person with these characteristics will be vulnerable and not every vulnerable person will have these characteristics.

Key flags to look out for in terms of circumstances rendering a witness vulnerable would be alleged traumatic incidents such as sexual assault in the workplace, accidents that have caused trauma

8

Powers of the civil courts regarding vulnerable witnesses

6.

The Court, with the assistance of the parties, should try to identify vulnerability of parties or witnesses at the earliest possible stage of proceedings and to consider whether a party's participation in the proceedings, or the quality of evidence given by a party or witness, is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make directions as a result.

7.

If the court decides that a party's or witness's ability to participate fully and/or give best evidence is likely to be diminished by reason of vulnerability, the court may identify the nature of the vulnerability in an order and may order appropriate provisions to be made to further the overriding objective.

9

Powers of the tribunal

15. The measures that might be relevant and available include those which:

- prevent a party or witness from seeing or being seen by another party or witness (such as screens)
- allow a party or witness to participate in hearings and give evidence from another location by live link (such as by Skype or video conferencing or telephone)
- provide for a party or witness to use a device to help communication
- provide for a party or witness to participate in proceedings with the assistance of an intermediary (such as a communication specialist or BSL interpreter)
- provide for a party or witness to be questioned in tribunal with the assistance of an intermediary.

18. The tribunal may not direct or order that public funding must be available to provide such a measure. That is properly a matter for Her Majesty's Courts and Tribunals Service (HMCTS) and the Ministry of Justice (MoJ). Nevertheless, some public funding for a medical report or evidence might be available in some circumstances. If an Employment Judge orders the production of essential

10

Associated powers

- The criminal courts have legislation in dealing with vulnerable witnesses Youth Justice and Criminal Evidence Act 1999
- Codified in law, these provisions are often used as a guideline of the types of adjustments available by the civil courts, they are therefore essential reading when requesting/opposing adjustments
- They include provisions such as: video recorded evidence; evidence through a video link; screens; communication aids; intermediaries
- They are much less flexible than the CPR
- The Family Procedure Rules also have directions on dealing with vulnerable witnesses

11

Case law examples: civil courts (1/4)

- [Brian Morrow v Shrewsbury Rugby Union Football Club Limited \[2020\] EWHC 379 \(QB\)](#)
- PI case in which a man had been struck in the head and fell unconscious. C's case was that owing to anxiety and stress caused by the accident and proceedings he needed an intermediary, an adjustment available under the 1999 Act
- In criminal cases the court should hold a 'ground rules hearing' before awarding adjustments to consider their nature and extent and formulate directions. This is not imperative in civil cases due to the discretion of the court but judges may often consider it advisable

12

Case law examples: civil courts (2/4)

- In this case the Defendant did not object to the use of an intermediary and the judge felt it was in his discretion to award one. However, where this is opposed by a defendant, it would be within the judge's discretion.
- The judge did not grant the intermediary the full powers they would have had in the criminal courts, eg the intermediary did not have the power to intervene if they felt ground rules were being breached (this was held to be a matter for the judge) or ask counsel to rephrase questions (again a matter for the judge)

13

Case law examples: civil courts (3/4)

- [Rackham -v- NHS Professionals Limited \[2015\] UKEAT 0110 15 1612](#)
- A Claimant in the employment tribunal had autism and anxiety. The judge at a preliminary hearing recommended an expert report to decide what adjustments would be appropriate. Neither party could or would fund it and the Respondent suggested that the medical notes be used instead. The Claimant agreed to this and some reasonable adjustments from these.
- He later appealed the decision on the basis that the expert report which had been initially recommended was not obtained and so the decision was unfair

14

Case law examples: civil courts (4/4)

-
- The EAT laid down guidance for future cases: (i) what is reasonable must be tailored to the needs of the individual before the tribunal; (ii) if a person is entitled to make a decision affecting the conduct of their case makes a decision, it is not in general for a court to second-guess that decision; (iii) emphasis should be given to holding Ground Rules Hearings where appropriate
- The judge's refusal to adjourn to obtain an expert report was not here an error of law

15

Key points from procedural rules and cases

-
- Even with the new CPR rules in place, although they codify what a vulnerability is, they leave adjustments to the discretion of the judge
- Although judges will use the codified adjustments from criminal law as a guide, they might depart from these
- It will be difficult for a party to appeal a case based on the lack of accommodation, so long as it has been appropriately considered by the judge in line with the overriding objective
- This is particularly true where there has been prior agreement between the parties
- Ground rules hearings in case of adjustments are common and advisable in many cases but not required

16

Tips for dealing with vulnerable witnesses proactively

- Use the provisions in the 1999 Act and the Family Court as guidance
- Remember that vulnerability depends on outcome it is not automatic in any given case
- Use the discretionary nature of the CPR/presidential guidance to your advantage.
- If you are acting for the vulnerable witness you can tailor-make the request for adjustments for your client really needs
- If the vulnerable witness is appearing for your opponent you can make sure that only the essential adjustments are given and not ones which prejudice your case

17

Tips for dealing with vulnerable witnesses proactively continued

- If possible, seek agreement with your opponent on the adjustments before going in front of the judge. These will be much more likely to be granted and much less likely to be appealable if agreed.
- Remember if you are opposing a vulnerable witness, a judge will feel more comfortable ruling for you if he feels that their adjustments have been taken seriously and addressed.

18

Conclusion

It is an important part of a case to consider and address whether there will be any vulnerable witnesses appearing

This is particularly true given the recent changes to the CPR

19

Further resources

- Equal treatment bench book
- CJC vulnerable witness report
- Advocate's gateway toolkits

20

10

Thank you,
Any questions?