ROUGH JUSTICE

Jonathan Wheeler and Felicity Gerry QC examine recent developments in relation to vulnerable witnesses

It is incumbent on a system of justice to protect the vulnerable and the disadvantaged. The suicide of Frances Andrade in January 2013 was a wake-up call for everyone in the criminal justice system, which many perceived had failed her abysmally. It has inevitably shed light on the treatment of vulnerable witnesses in our civil courts too.

Having just finished giving evidence against Michael Brewer at his criminal trial, whom she accused of abusing her when she was a child, Andrade took an overdose of prescription drugs and died three days later. She did not live to see Brewer convicted of offences against her. In cross examination, Brewer's counsel had carried out her instructions in accusing Andrade of being a liar and a fantasist. Andrade had texted a friend after her ordeal in court, saying that the experience had made her feel like she had been 'raped all over again'.

The old fashioned adversarial approach is based on historic rules of competence. Calling evidence from women and children and other vulnerable witnesses was believed to be inherently dangerous (*R v Brasier* (1779) 1 Leach 199; 169 ER 202). Corroboration was required, and judges routinely warned juries that such testimony was unreliable. The modern approach recognises research that, given the right assistance, witnesses can be questioned and cross questioned without unnecessary trauma in a balanced way that allows for a fair hearing for all concerned.

Andrade had a known history of mental health problems, and her treatment as a victim of crime is not uncommon. Traditionally, witnesses are required to relive their traumatic experiences in the unfamiliar, very formal and sometimes hostile environment of a court room. But this is not just a problem for the criminal justice system which – as we will see – has taken pro-active steps to address the issue of vulnerable witnesses. The family courts and our civil courts are also daunting and unfriendly places, where very personal issues, often traumatic to the individual concerned, are ventilated in a similar way. Advocates and the judiciary in criminal and family cases are changing the way they practice. Personal injury lawyers represent people who are vulnerable too, and it is time that we also re-appraised the way that justice is done in our cases and our courts.

Personal injury cases

Many of us have personal experience of clients who have taken a lower offer than advised, in order to avoid the trauma of a trial. In representing survivors of child abuse in compensation claims, often our clients have already undergone a bruising

experience in the criminal courts. Many will come to us as damaged individuals with long-standing psychological problems. Of course, this is not confined to child abuse cases. Colleagues specialising in other aspects of personal injury law represent clients with similar needs and report similar experiences.

We have to be sensitive to our clients in the way we interview them and interact with them generally, before their case ever gets anywhere near a courtroom. Many psychiatrists believe that the stress and trauma of the litigation process can prolong or exacerbate the psychological symptoms with which our clients suffer. The whole reason we do this work, and represent the people we do, is to help them recover from the appalling trauma they have experienced. It is difficult if not unpalatable to know that the very process we use to help our clients is also a means of their torment. We must work together to ensure that our justice system, while remaining robust, is not abusive to those who participate in it. Claimants *and* defendants may be vulnerable, and this needs to be recognised, and our processes adapted to accommodate them, to deliver a fair result.

Current developments

The NSPCC has launched a campaign to protect child witnesses in cases where they have alleged that they are the victim of abuse (see http://tinyurl.com/m236deu). The charity cites examples of advocacy which did not apply expected good practice, and it makes for grim reading. One mother, Erica, says that the barristers for both prosecution and defence were so insensitive in their questioning that one day in the witness box destroyed her children's self-confidence, which took years to re-build. Concern is expressed that the presiding judge must have taken the view that there was nothing wrong with this, and did not step in. Such examples are being used as part of a campaign to demand better treatment of child witnesses. The same issues have been raised by a few practitioners for a long time and are now, finally, being heard by the judiciary. It is vital that witnesses in all proceedings are supported to be able to give their best evidence.

A pilot scheme which allows vulnerable witness's cross-examination to be pre-recorded is running in three crown courts – Kingston, Leeds and Liverpool. The judges are 'vetting' the cross-examination questions before they are put. Subject to a positive evaluation, the Justice Minister has pledged to roll out the scheme for child witnesses throughout England and Wales. In addition, the Ministry of Justice has announced that, by March 2015, it will devise a requirement that publicly funded criminal advocates undergo specialist vulnerable witness training before being allowed to take on sexual assault and rape cases.

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The Interim Report of the Children and Vulnerable Witnesses Working Group, set up by Sir James Munby, President of the Family Division, was published in August this year. It draws on the experience of the Advocacy Training Council after a decade's research into the treatment of vulnerable witnesses in criminal cases. There are 20 recommendations, largely taken from the toolkits prepared and published by the Advocate's Gateway. The findings are a lesson for the civil courts dealing with claims for personal injury, and the authors hope that it is only a matter of time before civil proceedings involve similar measures. The toolkits demonstrate that this does not inhibit cross examination, and that fair trials are perfectly achievable.

Interestingly, by November 2015, EU member states will need to have shown that they have modified their domestic laws to give effect to the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime by adopting various means, combining legislative, administrative and practical measures, and taking into account good practices in the field of assistance and protection for victims. To begin to understand how this might interest civil practitioners, it is worth noting that, for the purpose of the directive, a victim is defined as follows:

- a natural person who has suffered harm (including physical, mental or emotional harm or economic loss) directly caused by a criminal offence - regardless of whether an offender is identified, apprehended, prosecuted or convicted, and regardless of the familial relationship between them (see Recital 19).
- family members of a deceased victim, who have suffered harm because their loved one's death was directly caused by a criminal offence (paragraph 1(a)(ii)). The criterion 'harm' should be interpreted in the context of the individual emotional relationship and/or direct material inter-dependence between the deceased victim and the relative(s) concerned.

In the family arena, the Family Court working group makes it plain:

> 'There is a pressing need for us to address the wider issue of vulnerable people giving evidence in family proceedings, something in which the family justice system lags woefully behind the criminal justice system. This includes the inadequacy of our procedures for taking evidence from alleged victims... processes which we still tolerate in the Family Court are prohibited by statute in the Crown Court'.

The President of the Family Division has proposed training for judges and advocates

communicating with children and other vulnerable witnesses, greater support for such witnesses, and the more effective and efficient use of court time. The practical application of the work of the Advocacy Training Council to the family justice system is already underway in the form of general guidance for family lawyers and advocates being prepared by the *Advocates' Gateway*, as a toolkit for use in family proceedings. The guidance is in draft form and, at time of writing, is due to be published this autumn. The use of intermediaries and of pre-recorded oral evidence, for example, will 'enable vulnerable witnesses to participate in the hearing in a manner that best meets their needs by ensuring that the evidence they give is the best evidence achievable'.

Some of the initial proposals to apply to all family court cases are as follows:

i. New mandatory practice directions

ii. The term 'vulnerable witness' to be extended to cover the parties as well as witnesses.

iii. Rules to be inserted in the Family Procedure Rules 2010 (FPR) to identify the necessary support/ special measures for vulnerable witnesses and/or parties from the start of any proceedings, or at the earliest opportunity.

iv. Requirements that the court/ judge will recognise the role of children and/or the needs of children at the outset of proceedings, either as participants in proceedings who should be given the opportunity to communicate with the judge, and/or as witnesses, and consider how best to provide for their participation and support.

v. Requirements that the court/ judge will identify whether a party or witness is vulnerable at the outset of the proceedings, or their involvement in proceedings (whichever is the sooner), and make provision for such support, special measures or other assistance they may need to properly and fully participate in the proceedings and to give their best evidence;

vi. Requirements that all the advocates and representatives of the parties must identify and consider how best the role of the child is to be recognised and/or provide for any assistance and support they need to give their best evidence.

vii. Requirements that all advocates and representatives of the parties must identify if a party or witness is vulnerable and consider how best he or she can be supported and assisted to give their best evidence.

viii. The same requirements to apply to litigants in person.

ix. The practice direction to give guidance for judges seeing children.

x. The practice direction to include consideration of the status and nature of the contents of the communication between judge and child.

xi. The practice direction to include procedure, practice and guidance for provision of special measures, support and/or assistance for vulnerable parties or witnesses, including children, to give their best evidence

xii. The rule and practice direction should be drafted with reference to the existing Special Measures Directions In the Case of Vulnerable and Intimidated Witnesses, and the procedure and practice that have developed in the criminal courts pursuant to the Youth Justice and Criminal Evidence Act 1999 and the work of the Advocacy Training Council.

xiii. Particular consideration should be given to the provisions for parties and witnesses in cases of forced marriage (FM) and female genital mutilation (FGM). In FM cases, nullity hearings are in open court, when the protected person is a vulnerable witness who is likely to have to give evidence of a most intimate and sensitive nature. In FGM cases, the child and/or other witnesses are most likely to need support and special measures for the same or similar reasons, and such support and assistance should be provided by the judge, court and advocates.

Implementation will be by training which judges and advocates will be 'expected' to attend. If the family courts are to follow the criminal court example by virtue of the efforts of a few practitioners, the effect of the Directive will make that process inevitable and so, by extension, civil proceedings - including those for personal injury compensation - will need to adapt, and adapt soon. In our view, this applies as much to the preparation stages of litigation as it does to the presentation of cases in court. It is perhaps obvious to say that a case cannot properly settle if the evidence has not been collected properly, and advocates cannot rely on an assumption of expertise in this difficult field of law.

The very process we use to help our clients is also a means of their torment

It is perhaps amazing that it has taken so long for the English courts to progress to enable vulnerable people to effectively participate in proceedings; and it is remarkable that such change has been led by the criminal rather than family courts. For civil practitioners, it is a brave new world, and personal injury lawyers too need to engage with, and be a part of, the conversation.

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