The Forum of Complex Injury Solicitors (FOCIS)

Response to the Civil Justice Council's consultation paper on Vulnerable Witnesses and Parties within civil proceedings

About Us

FOCIS members act for seriously injured Claimants with complex personal injury and clinical negligence claims, including group actions. The objectives of FOCIS are to:-

1. Promote high standards of representation of Claimant personal injury and medical negligence clients,

2. Share knowledge and information among members of the Forum,

3. Further better understanding in the wider community of issues which arise for those who suffer serious injury,

4. Use members' expertise to promote improvements to the legal process and to inform debate,

5. Develop fellowship among members.

See further www.focis.org.uk.

Membership of FOCIS is intended to be at the most senior level of the profession, currently standing at 22 members. The only formal requirement for membership of FOCIS is that members should have achieved a pre-eminence in their personal injury field. Seven of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

Anthony Gold	Hugh James
Atherton Godfrey	Irwin Mitchell
Ashtons	Kingsley Napley
Balfour + Manson	Leigh Day
Bolt Burdon Kemp	Osbornes
Dean Wilson	Potter Rees Dolan
Digby Brown	Prince Evans
Fieldfisher	Rix & Kay
Fletchers	Stewarts
Freeths	Thompsons NI
Hodge Jones & Allen	

FOCIS members act for seriously injured Claimants with complex personal injury and clinical negligence claims. In line with the remit of our organisation, we restrict our responses relating to our members experience, practices and procedures relating to complex injury claims only. We will defer to others to respond on the impact relating to other classes of case.

Response from the Forum of Complex Injury Solicitors (FOCIS) to the Civil Justice Council's Consultation: "Vulnerable Witnesses and Parties Within Civil Proceedings – Current Position and Recommendations for Change".

About Us

FOCIS members act for seriously injured claimants with complex personal injury and clinical negligence claims, including group actions. The objectives of FOCIS are to:-

1. Promote high standards of representation of claimant personal injury and medical negligence clients,

2. Share knowledge and information among members of the Forum,

3. Further better understanding in the wider community of issues which arise for those who suffer serious injury,

4. Use members' expertise to promote improvements to the legal process and to inform debate,

5. Develop fellowship among members.

See further www.focis.org.uk.

Membership of FOCIS is intended to be at the most senior level of the profession, currently standing at 22 members. The only formal requirement for membership of FOCIS is that members should have achieved a pre-eminence in their personal injury field. Seven of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

Anthony Gold	Hugh James
Atherton Godfrey	Irwin Mitchell
Ashtons	Kingsley Napley
Bolt Burdon Kemp	Leigh Day
Dean Wilson	Potter Rees Dolan
Digby Brown	Prince Evans
Fieldfisher	Slater & Gordon Lawyers
Fletchers	Stewarts
Freeths	Thompsons NI
Hodge Jones & Allen	

FOCIS has been the name since 2007 of the organisation formerly known as the Richard Grand Society (founded in 1997 based on the concept of the American 'Inner Circle of Advocates' which had been formed in 1972 by Arizona and San Francisco Attorney Richard Grand).

FOCIS members act for seriously injured claimants with complex personal injury and clinical negligence claims. In line with the remit of our organisation, we restrict our responses relating to our members' experience, practices and procedures relating to complex injury claims only. We will defer to others to respond on the impact relating to other classes of case.

FOCIS welcomes the opportunity to respond to the Civil Justice Council's consultation paper.

The authors of this response

Jonathan Wheeler is Managing Partner at Bolt Burdon Kemp. He co-authored the Advocates' Gateway Toolkit 17 and as a former president of the Association of Personal Injury Lawyers and a contributor to IICSA's work, has been campaigning for a codified set of rules to help vulnerable witnesses and parties to give their best evidence in the civil courts since (at least) 2015.

Hugh Potter is the Senior Partner of Potter Rees Dolan Solicitors which provides specialist legal services such as Deputyships and DWP appeals to those with profound disabilities. He has pursued claims for compensation for incapacitous and vulnerable capacitous Claimants –often with acquired brain injuries - for over 30 years.

Introduction

On a general note, FOCIS very much welcomes the CJC's proposals.

It is accepted that whilst there is no codified regime, the court does have existing powers within the CPRs to assist vulnerable witnesses and parties. The CJC's report references several examples – CPR 3.1A (5) and CPR 31.2 to name but two (para. 155). What has been missing is a specific requirement for the parties (and the court when first seized of the case) to identify any vulnerability which may affect a witness' ability to give his/ her best evidence at the earliest opportunity. What the CJC proposes will – we hope – lead to a cultural shift amongst judges, parties' representatives and all court users, promoting a consistent application of the rules in all our courts, allowing vulnerable parties to participate as much as possible in their actions.

Question 1

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

1.1 Definition of vulnerability

The CJC does not define vulnerability and a restrictive definition is unlikely to be helpful. However sections 16 and 17 of the YJCEA 1999 – reproduced at para's 40 and 41 of the CJC's paper – provide a starting point which could be replicated. This approach is supported for example in The Advocate's Gateway's Toolkit 10, "Identifying vulnerability in witnesses and parties and making adjustments". It may be useful for such to be included in specific guidance for those completing the new Directions Questionnaires at the point when the parties' attention is drawn to addressing the vulnerability of any witness.

1.2 Pre-recorded witness' evidence

At paragraph 36, the CJC appears to reject the pre-recording of a vulnerable witness' evidence, saying this will be of limited assistance as evidence-in-chief in civil cases is given by way of a witness statement. At paragraph 135 such a power is stated as being "not applicable" in civil and family cases (in contrast to criminal cases). However there may be instances where the pre-recording of evidence of a witness may be appropriate or desirable and we do not believe that this option should be excluded. The aim of these reforms is to allow vulnerable witnesses to give their best evidence and the more powers open to a procedural or trial judge to achieve that the better. It is appreciated that in civil cases, there is the power to take a deposition (CPR 34.8), but as the CJC's paper notes this is rarely used (para 93), and in any event this is the taking of live evidence, rather than pre-recorded.

1.3 Costs

In cases where witnesses or parties are vulnerable and may require special measures, additional work is likely to be required over and above the 'norm' (for example, the appointment of an intermediary and the additional need for participation in directions/ ground rules hearings). Changes must be made to the fixed costs regime and allowance be made when budgeting cases.

Question 2

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

2.1 – Rule changes – agreed

2.2 – Direction questionnaires – we believe para 202 should read slightly differently, to the effect that the DQ will include an obligation to disclose known details of any vulnerability. Otherwise agreed.

2.3 – Training for civil judges – agreed, and with the earnest hope that MoJ resources will be found to enable this.

2.4 – Intermediaries – we live in the real world at FOCIS, and do not believe that public funding is likely to be made available to pay for an intermediary even where the court believes this is likely to assist a witness or party to give his/her best evidence. We believe that the approach in the civil courts to such additional costs should be similar to the use of a translator or interpreter: the party who requires such assistance will be expected to cover the fees for it initially, but these fees can be properly included in the party's costs budget and the overall costs of the case, and ultimately may be recovered from the losing party where an inter-partes costs order is made. In appropriate cases the court should order that an interim costs order be made to facilitate funding most often where primary liability is not in serious doubt.

2.5 – Court protocols and guidance – agreed. We would add that attention must be given to the drafting of these, to make them accessible to vulnerable court users (unlike the example at annexe 1 from Bristol Civil and Family Justice Centre, which makes needless reference in paragraph 2 to "Part 3A of the Family Proceedings Rules" and "Practice Direction 3AA" for example.) In addition to the FPR protocols the courts should be encouraged to list civil claims on behalf of a vulnerable party as soon as possible to be case managed by a 'trained' interlocutory judge (supra) designated to the case and who will consider as a priority participation directions.

2.6 – Staff training – agreed.

2.7 – Criminal Compensation Orders – we do not agree with this recommendation and feel this is rather 'out of scope' of the CJC's remit. We believe the CJC may feel it is addressing IICSA's concerns that having recommended that special measures for vulnerable witnesses should be made, the costs of these should not fall on victims and survivors bringing a civil claim (see para.9). However Criminal Compensation Orders are not the answer here, instead the civil costs regime should be adapted to deal with the additional work which is likely to be required to accommodate vulnerable witnesses and parties (for example see our responses at 1.3 and 2.4 above).

It does seem surprising that the Civil Justice Council is opining on matters of compensation which can only be ordered by the criminal courts. It is accepted that such orders are rarely made despite the court's powers to do so, but there are some understandable reasons for this:

Unlike civil compensation orders, in the criminal courts account must be made of the defendant's means;

This often results in a very low award, as recognised at para 185 of the CJC's paper, and which can be seen as an 'insult' to the complainant;

A victim may believe that a compensation award at the end of a criminal case, would be his/her only 'bite of the cherry' as far as compensation is concerned. There is not a universal understanding of the difference between criminal and civil jurisdictions/ courts;

In particular a complainant may be unaware that they may have access to a higher award through the CICA or the civil courts (particularly for the latter if their abuser was acting in a way closely connected with his employment, meaning that vicarious liability may attach to their employer who may well be insured and have greater resources with which to compensate the victim);

The criminal court / prosecution is not geared up for the task of evidence gathering to justify the compensation award;

The criminal justice system is already over-stretched, and dealing with such orders properly is likely to adversely affect the system further;

There are likely to be problems involved in enforcing any compensation order – who is it suggested should do this? The prosecution? Again, the CPS is not geared up for this, and for it to do so would only further stretch its resources;

That said, if a criminal judge on making a compensation order would always direct the victim to seek advice from a civil lawyer as to whether they could bring a compensation claim either through the civil courts and /or the CICA, this would be more palatable. We cannot however agree with the CJC at para 199 that by promoting criminal compensation orders this may "*significantly reduce the need for subsequent civil actions*". For the reasons above, criminal compensation orders have their short-comings and should not be seen as a proper alternative to civil awards.

Question 3

Do you believe that there should be further or alternative recommendations? If so please set out relevant details.

3.1 The role of regulators & representative bodies

Representatives' professional bodies (The Law Society, The Bar Council, CILEX) and regulators should be promoting a widespread understanding of vulnerability, and insist that practitioners dealing with civil litigation, using the civil courts, should be fully aware of the available guidance and best practice in this area, such as an inside knowledge of The Advocates' Gateway toolkits.

3.2 Practicalities

The state of the court estate is a concern to all practitioners (and we are sure the judiciary). The closure of many courts means that justice becomes less accessible (geographically at least) for all court users; this will particularly affect the vulnerable. The MoJ says that the court closure programme goes hand in hand with a programme to improve those courts that remain open. Ensuring that the court building/ court rooms can physically accommodate things like specialist waiting areas for vulnerable witnesses, separate entrances and exits, the ability to give video evidence, and provide screens around the witness box (for example) will be key to ensuring that the practicalities mirror the ideals behind these proposals.