PERSONAL INJURIES BAR ASSOCIATION

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Vice-chair: Steven Snowden QC, 12 King's Bench Walk, DX 1037 London Chancery Lane snowden@12kbw.co.uk

Secretary: Richard Wilkinson, Temple Garden Chambers, DX 382 London Chancery Lane rwilkinson@tgchambers.com

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PIBA response to the Civil Justice Council's consultation on "Vulnerable Witnesses and Parties within Civil Proceedings: Current Position and Recommendations for Change."

Introduction to PIBA and its members

PIBA is a specialist bar association with about 1,450 members who practise in personal injury law, including industrial disease and clinical negligence cases.

Many PIBA members have considerable experience of litigation in the civil courts involving vulnerable witnesses and parties, such as those who lack capacity, are close to the borderline of capacity or whose capacity fluctuates, by reason of brain or psychiatric injury or illness, age or other disability. Other relevant categories of vulnerable party and witness represented and encountered by PIBA members in their work include the bereaved, victims of abuse and other crimes. Many PIBA members also sit in a variety of part-time judicial and tribunal roles at all levels, case managing, trying and determining cases across the full breadth of the civil and other jurisdictions.

Our observations on the CJC's consultation and response to the three questions posed are as follows:

Overall observations and additional points (Questions 1 & 3)

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

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

1. The initiative is to be applauded and is long overdue in the civil jurisdiction.

2. *Observation of other courts:* The civil courts can learn from and achieve much from observing how the family, criminal and court of protection jurisdictions have addressed these matters.

3. *Non-adversarial approach:* Proper access to justice for vulnerable people requires a wholesale change in the way parties approach litigation. There has to be a sense of collaboration between parties to ensure that best evidence is achieved and this may mean setting aside tactical advantage in order to achieve an outcome that is fair in the wider sense.

4. *Training:* As well as training for civil judges, training for solicitors, barristers and all other advocates is an essential component of the process. Just as advocates are required to show they have training in place at a ground rules hearing in the criminal court, so too, over time there needs to be an unrolling of training for those practising in the civil courts and demonstrable confirmation of the same at a CMC stage.

5. The Advocate's Gateway has produced comprehensive and admirable training and information for the criminal bar. As an independent body, founded in 2012, to provide free access to practical, evidence-based guidance on vulnerable

witnesses and defendants, its experience in the criminal field is unparalleled. Communication with the TAG committee to learn from its experience and seek ways to embrace and enlarge its endeavours for use in the civil court system would seem an important first step.

6. *Litigants in Person:* There needs to be a fuller consideration of the role of Litigants-in-Person ("LIPs"). All of the suggestions and provisions in the Consultation require funding at a time when the civil courts have fewer resources and legal aid/ support for litigants has decreased substantially. All of the recommendations need to be considered and tailored both for a represented party and for LIPs.

7. *Early assessment and identification of vulnerability:* It may be that an assessment of vulnerability and capacity to conduct litigation needs to be addressed at the earliest stages of a hearing. Consideration should be given to the court ruling, or directing, that a particular party has vulnerabilities that render them unable to conduct litigation as a LIP. Alternative means of funding or representation to enable such court users proper access to justice needs to be provided.

8. *Witness statements:* Very few cases actually come to court. Written witness statements often form the only evidence seen, or at the very least the evidence in chief, with court questioning and testing of evidence being restricted to cross examination.

9. This means, therefore, witness statements become important and influential documents. Often, however, witness statements are generic and/or are produced at an early stage long pre-proceedings and/or are created by investigators who are not lawyers, especially in low value cases. This causes problems across the board but particularly where there is a vulnerable witness. There needs to be early identification of those who may not be able to give evidence in court (but have capacity to do so) and those who may be vulnerable as a party or witness. This cannot be left to the final trial or the run up to it (i.e. addressing this at a Pre-Trial Review would be too late as trial arrangements would already be in place).

10. It may be that a witness statement cannot be taken from a vulnerable person without a supporter present: the court will need to be clear or confident that a vulnerable party has given evidence in a witness statement that is obtained in the

best way possible so as to achieve "best evidence" and the account is not, for example, tainted by bias/ pressure or any other potential problem.

11. Further, it can often be the case that a party is arguably too injured to attend trial and give evidence or stand up to cross-examination or may decide not to serve a witness statement. However, evidence of accident circumstances, condition or quantum and outcome may be presented by way of discourse recorded by an expert witness setting out hearsay evidence elicited during an examination and preparation of an expert report (medical or non-medical). There are particular difficulties where this information is used by a party as evidence of a loss or to prove a claim but where this information has not been formally adduced in evidence nor subject to examination and testing by the other parties in the litigation. Those other parties may seek permission to call such a party to be cross examined, where no witness statement has been served, the situation which arose in cases such as *Brown v Mujibal* [2017] 4 WLUK 42 and *G (A protected party by his Litigation Friend SX) v Hassan* [2019] 6 WLUK 441. How such hearsay evidence is best presented, whether parties should be permitted to cross examine the opposing party (who may lack capacity or be vulnerable) and guidance for vulnerable witnesses, parties and the court in achieving best evidence in this type of situation needs to be considered carefully.

<u>Comments on Recommendations (Question 2)</u>

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

12. We have the following observations on the recommendations made:

    (1) *Rule Change*: yes, this should take place. There should be a change to the Overriding Objective so that these considerations are placed at the heart of the case management process in every case. There also needs to be thought given as to how cases proceed before they get to court/ before issue takes place/ when they are in the Portal - some rules apply before proceedings are issued (such as CPR 21 approval) – consideration should be given to extending this to other rules.

(2) *Directions Questionnaire*: PIBA agrees that the way in which vulnerability issues are elicited from parties will need careful handling, whether done through DQs or otherwise.

a. The process will need to be tailored to the vulnerable, especially LIPs with vulnerabilities, to avoid the process defeating the object it seeks to achieve.
b. There is an issue with timing and declaration. People (parties or witnesses) may not wish to disclose vulnerability, may have difficulty expressing it without support, may not know they have a vulnerability that should be disclosed or may not want to expose themselves to being taken advantage of tactically.
c. Litigants may well be unaware of vulnerabilities of any witnesses they seek to rely upon or vulnerabilities among potential witnesses for the other parties.
d. There will need to consideration of court powers to sanction a party which raises bogus vulnerability issues on its own side- or suggests them about the other side- simply to make mischief or for some perceived tactical advantage.
e. Whilst there are pros and cons about the stage at which a party may be obliged to raise vulnerability issues, the issue cannot be put off, since vulnerability will affect and infect the whole proceedings. Accordingly, it needs to be known about as soon as possible.
f. Consideration should be given to an option for this to be done without disclosing it to the other side if so advised, for the Court to consider.
g. Consideration also needs to be given to the digital nature of Portal cases and/or the plans for online courts and paper / electronic cases and how the current proposals will function in an increasingly online civil justice system, particularly for lower value cases.
h. The system will also need a safety net for issues which only become known or only arise late in the litigation process or for those where the vulnerabilities are just not recognised.
i. There will need to be sufficient flexibility of process and protocols for inter-jurisdictional cooperation to avoid this derailing a trial by,

for instance, transferring to a different court centre (perhaps a crown court) with necessary facilities rather than adjourning the trial.

(3) *Training*: yes, this is very important and needs to cover the judiciary and the Bar and solicitors: all potential representatives of parties. Not only does training need to be expansive but a very wide and inclusive definition of vulnerability needs to be adopted to make sure it covers the autistic spectrum and also those who are vulnerable due to cultural distinctions – such as the inability to speak to those in authority/ inability to criticise those in command. Cultural vulnerabilities can be extensive. The guidance in the Equal Treatment Benchbook would be a good starting point for identifying the learning points which need addressing in the civil jurisdiction. Giving evidence needs to be considered in its widest sense, not just in court since so much evidence is given before court, not in a statement, and many cases do not get to court.

(4) *Intermediaries*: These are perhaps less important than the need to have properly resourced and trained legal representatives. When there is proper party representation then intermediaries are not required. It is more important in the criminal court when the victim of the crime does not have a representative per se. In civil litigation, the vulnerable person will very often be a party, perhaps, more often, the claimant, and will potentially have support if they have representation.

(5) *Court Protocols and Guidance*: PIBA agrees these are important but at a time when "fast tracking" and "block listing" are the watch words for the courts, it is hard to see how this will work: the ability to visit a court in advance is predicated on:

a. the vulnerable person being able to travel to and access the court,
b. there being a court room that is likely to be the one in use at the trial,
c. a judge present who will be the trial judge and counsel who will be the same counsel as used at trial, all quite unlikely.

Few civil courts, even in combined court centres, save those which double up as criminal courts, have permanent facilities to accommodate video link evidence or provide screens. Indeed, many civil court hearings are heard (in open court but) in District Judges' chambers where the size and configuration of the room could not (or not readily) accommodate such adjustments. Also, there are no facilities for people to be made comfortable at most civil courts and no facilities for refreshments/ break out/ escape etc. Too often everyone is housed in one waiting room with a long wait, a long list etc. – these are problems that are profound for all court users but amplified for the vulnerable. Block listing is almost entirely opposite to the sort of environment in which a vulnerable person will be able to give best evidence. Court listing generally, and time estimates specifically, will need to be tailored to the needs of the individual case, where vulnerability arises. Inevitably, more court time will be required to achieve best evidence. There will need to be protocols requiring cross-jurisdictional cooperation so that, for example, a civil trial can be listed in a criminal court to use the video link facilities or similar. This will of course have resource implications for staff. But this might provide a more agile use of the courts estate at a time when sitting days in the criminal courts have been reduced and crown courts regularly have unused courtrooms.

(6) *Staff training*: yes, this is important as is continuity of staff dealing with a particular matter and/or proper record keeping for those who may pick up an ongoing matter, so that a party is not worn down by having to explain their situation repeatedly. It is also important for there to be a clear way of communicating with the court, telephone lines that are answered and an ability to visit the court for face-to-face contact between the vulnerable and staff members etc.

(7) *Compensation*: yes, this is a very good idea for the cases where compensation could be dealt with by the criminal court and so prevent a need to come to the civil court at all. A culture change will be needed given the apparent reluctance of judges to use their existing powers to award

compensation in criminal cases. But this is only a partial answer as often, in save but the most straightforward cases, there will be insufficient evidence as to diagnosis, prognosis, causation and other losses for a realistic valuation to be put on a compensation award of the type which would obviate a need for a civil claim entirely. This is before one considers issues of enforcement of such awards.

Emily Formby, Judith Ayling (39 Essex Chambers)

and Charles Bagot QC (Hardwicke)

On behalf of the PIBA Executive Committee