

## **Bringing Out the Best Evidence: Recognising and Responding to Witness Vulnerability**

### **Introduction**

1. When we talk about evidence in personal injury and medical negligence cases our instinct is to concentrate on relevance, credibility and reliability of witnesses, how best to build a case and how to challenge witnesses in order to achieve our aim. However, the issue of *how* the evidence of witnesses is taken is every bit as important as the evidence itself. The manner in which a witness is heard can fundamentally affect what the court hears and affect the ultimate outcome of your case.
2. You may be wondering why this is relevant at a clinical negligence conference. When we get caught up in the hum drum of case preparation, decisions about productions, court time tables and the angst of whether we are going to win or not, we forget about the humans – the witnesses – who are an integral part of the process in which we are involved. The ability of a witness to give coherent, truthful evidence is not automatic. It depends on how we, as practitioners, help the court to create the right conditions for that witness to give evidence.
3. Judges make findings in fact based on, amongst other things, witness evidence. They test and assess the credibility and reliability of the witnesses who appear before them. They do that by considering how the witness comes across, whether they answer particular questions, the way in which they answer certain questions, their demeanour, how they explain themselves and how their account aligns with the corresponding documentation.

4. Vulnerability — whether arising from age, mental health, trauma, disability, or the circumstances of the dispute — can profoundly affect how a witness experiences the court process and how effectively they can give their account to the court. As practitioners this is something we cannot afford to treat as peripheral or procedural. Clinical negligence cases can be emotive. Professionals are defending their reputations. Those who have been injured are seeking justice. The stakes are high. Recognising vulnerability early on ensures that the court hears the best evidence possible.
5. This is not about shielding witnesses from scrutiny. It is about recognising that fairness and effective evidence go hand in hand. A witness who feels safe and supported is far more likely to give clear, reliable evidence — and that ultimately serves the interests of both parties and the court.
6. Today I want to explore three questions:
  - When and how should we identify vulnerability?
  - What practical and legal tools are available to respond to it?
  - And how can we, as practitioners, make sure every witness — whatever their circumstances — has a fair opportunity to be heard?

## **Identifying and Assessing Vulnerability**

7. Vulnerability is not confined to obvious categories such as children or those with diagnosed conditions. There is no single, exhaustive definition of a *vulnerable witness*. Instead, the concept is grounded in both statute and judicial discretion. The starting point is *The*

*Vulnerable Witnesses (Scotland) Act 2004*, as amended which provides for special measures in both criminal and civil proceedings. Part 2 of the Act relates to civil proceedings.

8. The statutory framework casts a deliberately wide net. A *vulnerable witness* is one whose ability to give evidence may be affected by their personal circumstances or by the nature of the evidence they are to give. The test is deliberately wide and encompasses factors such as:

- **Age** — particularly children and older persons;
- **Mental disorder, learning difficulty, or physical disability**;
- **Fear or distress** in relation to giving evidence; and
- **The subject matter of the case** — for example, trauma, abuse, or sensitive family matter.

9. Section 11 of Part 2 of the *Vulnerable Witnesses (Scotland) Act 2004* sets out who may be considered a vulnerable witness in civil proceedings. There are two broad categories:

- Children: anyone under 18 at the start of proceedings; and
- Adults where there is a *significant risk* that the quality of their evidence will be diminished because of
  - a mental disorder (as defined in the 2003 Mental Health Act),
  - or
  - fear or distress about giving evidence.

Ministers can also prescribe other categories by order.

10. When deciding whether someone falls within that definition, the court must take into account a range of factors — not just diagnosis or age,

but the wider context of the witness's life and the proceedings. These include:

- the nature and circumstances of the dispute;
- the type of evidence to be given;
- any relationship with a party;
- the witness's age and maturity;
- any behaviour by parties or others towards them; and
- wider considerations such as cultural background, sexual orientation, domestic and employment circumstances, religious or political beliefs, and any physical disability or impairment.

It is a deliberately broad and flexible test — designed to let the court recognise vulnerability wherever it arises, not only in obvious or traditional categories.

11. In practice, identifying potential vulnerability starts with us — the party citing the witness. The earlier this is done, the better. Ideally, it should form part of your very first consultation, whether you act for the pursuer or for a professional whose conduct is in question. Be alert to subtle signs:

- difficulty understanding or following discussion;
- anxiety, distress, or emotional volatility;
- indications of previous trauma;
- communication or sensory impairments; and
- the likely impact of facing, or being questioned by, another party.

You may also be alerted to issues of vulnerability in medical records or expert reports. Early recognition gives you time to plan, gather supporting material, and to ensure that the court hears the witness at their best.

## Guidance

12. Once you have identified possible signs of vulnerability, where do you go for guidance? A good starting point is the **Judicial Institute for Scotland's Equal Treatment Bench Book**, revised and republished on 3 October 2025. Every judge has a copy, and it's publicly available on the Judiciary of Scotland website. Although there is a focus on criminal cases — dealing with issues like domestic abuse, sexual offences and modern slavery — much of the guidance is also relevant to civil proceedings. There are valuable sections on communication, literacy and numeracy. There is a useful table on page 103, listing indicators of speech, language and communication needs. It reminds us that vulnerability is not always obvious.

13. Chapter 15 of the Bench book also gives concise descriptions of common mental disorders and other conditions which may lead to a person being considered to be vulnerable - including dyslexia, dyspraxia, ADHD, autism, schizophrenia, bipolar disorder, depression, anxiety, PTSD, acquired brain injury, personality disorder and dementia. It's a reminder that vulnerability can arise from various different sources — cognitive, psychological or situational — and that a “one-size-fits-all” approach will rarely work.<sup>1</sup>

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<sup>1</sup> Pages 64-67 of the Bench book

14. Another excellent resource is the Advocate's Gateway (TAG)<sup>2</sup> toolkits. These toolkits were developed under the leadership of the judiciary in England and Wales and supported by the *Council of the Inns of Court*. They provide accessible, evidence-based resources on communicating with vulnerable witnesses. The toolkits are widely used in criminal and family proceedings in England and have been endorsed by the Judicial College of England and Wales as part of professional training for judges and advocates.
15. You may wonder why I am mentioning English guidance. The answer lies in **Practice Note No. 1 of 2024 - Taking of Evidence of a Vulnerable Witness by a Commissioner** - issued by the High Court of Justiciary, which expressly refers to the TAG toolkits as useful reading.<sup>3</sup> The underlying principles transcend jurisdiction- enabling fair participation and quality of evidence are universal aims.
16. While the toolkits were designed mainly for criminal and family cases, the insights on communication, trauma and memory are directly relevant to civil litigation - particularly in personal injury, or medical negligence disputes. They are not prescriptive and of course they are not authorities. They are however practical, accessible and grounded in research. When using them, do be alert to procedural and terminology differences – for example in Scotland we have no direct equivalent to the Court of Protection.
17. Of particular interest are Toolkit 10, which deals with identifying vulnerability, and Toolkit 17 which focuses on civil procedure. Both emphasise an important point: vulnerability is not static – it can

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<sup>2</sup> <http://www.theadvocatesgateway.org>

<sup>3</sup> High Court of Justiciary Practice Note No 1 of 2024, Taking evidence of a Vulnerable Witness by a Commissioner paragraph 6

change over time. A witness may appear confident at the outset but start to struggle as the proof approaches. Stress, publicity or re-engagement with distressing material, can all affect the ability to give evidence effectively. I suggest that when you come to considering your witness list, you look at each individual; what might affect their capacity to give their best evidence? Build this into your case strategy as early as possible and keep this under review.

18. By way of illustration: a survivor of historic abuse may experience a deterioration in mental health as the proof nears. A clinician involved in a traumatic event – perhaps a fatal birth - may become increasingly distressed as hearings approach, particularly if they have already faced an in house inquiry or FAI proceedings. Even the process of recounting events repeatedly to experts can retrigger trauma. The earlier this is recognised the better you can plan – both to support the witness and to avoid any last minute crisis that could jeopardise the effectiveness of their evidence.

### **Responding to vulnerability**

19. Once vulnerability has been identified what do we do about it? The procedural framework is well established. Chapter 35A of the Rules of the Court of Session sets out the procedures to be followed on the lodging of a child witness notice or vulnerable witness application. In the Sheriff Court similar provisions appear –

- Chapter 17A of the Small Claims Rules <sup>4</sup>
- Chapter 18A of the Summary cause rules <sup>5</sup>

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<sup>4</sup> ACT OF SEDERUNT (SMALL CLAIM RULES) 2002 NO. 133

<sup>5</sup> Act of Sederunt (Summary Cause Rules) 2002 No 132

- Schedule 6 of the Fatal Accident Inquiry Rules <sup>6</sup> and
- Chapter 45 in the Ordinary Cause Rules <sup>7</sup>.
- Part 6, Chapter 24 of the Sheriff Appeal Court Rules where proof or additional proof is ordered.<sup>8</sup>

20. Once a vulnerable witness application is made, the court decides whether the witness is vulnerable and, if so, what measures are *necessary* and *appropriate* to ensure the witness can give their best evidence. Every case is different . For that reason I am not going to provide specific examples. The guiding principle is fairness — fairness to the witness, to the parties, and to the integrity of the proceedings. The purpose is not to create an advantage, but equality of participation.

21. The 2004 Act sets out a range of special measures that can be applied to assist a vulnerable witness. These include:

- **Taking of evidence by a commissioner** under section 19 - allowing evidence to be taken before the proof in a less intimidating environment.,
- **Use of a live television link** under section 20 – enabling the witness to give evidence from another room within the court building or from a remote location which can reduce anxiety, particularly where direct confrontation with a party is distressing.
- **Use of screens** under section 21 – preventing the witness from seeing a particular person while still allowing the judge, counsel, and other parties to observe them; and

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<sup>6</sup> Act of Sederunt (Fatal Accident Inquiry Rules) 2017

<sup>7</sup> ACT OF SEDERUNT (SHERIFF COURT ORDINARY CAUSE RULES) 1993 No.1956 (S.223)

<sup>8</sup> ACT OF SEDERUNT (SHERIFF APPEAL COURT RULES) 2015 [SSI 2015/356](#)

- **Use of a supporter** under section 22 - permitting a family member, carer, or trained professional, to sit nearby for reassurance without influencing the substance of the evidence.

22. Beyond these, the court can consider other non-standard measures - for example, taking evidence in private; allowing prior statements to stand as evidence-in-chief or adjusting the courtroom layout to reduce anxiety.

23. From a practitioner's perspective timing of an application is important. Early planning gives the court and the parties the best chance to make the appropriate arrangements. However there is a balance to be struck. Many cases in which we are involved settle in advance of the proof. It may be late in the day before you realise that a proof is going to run. But it is still important to consider vulnerability as early as possible. Early identification allows time to gather supporting material such as a medical report or statement from the witness.

24. It is impossible to be prescriptive as every case is different. However, I would suggest that the most persuasive applications should combine objective evidence -for example, a medical report and a detailed statement from the witness explaining their concerns and needs.

25. The vulnerability of witnesses should be under constant review.

Under section 13 of the 2004 Act, the court can review how evidence is to be taken at any stage – before or even during the proof. This can be at the request of the party citing the witness or on the court's own initiative. The court may vary a previous order for special measures if circumstances change - for example, if a witness no longer wishes to give evidence via video link or behind a screen. It can also authorise

new special measures if none are already in place. This flexibility allows the court to respond to the dynamic nature of vulnerability..

26. Even with measures in place, our own conduct remains an important consideration. How we question a witness can either enhance or undermine the effectiveness of special measures. We must, as advocates and solicitors adjust our tone and aim for questioning that is calm, clear and adapted to that particular witnesses needs. Precision and compassion in equal measure are required.

27. The Bench book reminds us that:

“Judges must ensure that, whilst attending court may still be nerve-wracking, emotionally draining and might involve recounting a traumatic experience, the individual is treated in court with dignity and respect. A witness, whether the accused, a party or a complainer, should always be put in the position of being able to give their best evidence to the court.”<sup>9</sup>

28. Other matters to be considered for all witnesses but particularly in relation to vulnerable witnesses during the course of giving evidence:<sup>10</sup>

- cross-examination must be focused and relevant. Judges can and should stop questioning that is “protracted, vexatious and unfeeling”
- Cross-examination should not be insulting or intimidating to a witness.

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<sup>9</sup> Page 84 of the Bench book

<sup>10</sup> Pages 79-81 of the Bench book

- Tone matters. “....questioning should not be in a tone that suggests incredulity at an answer, or in a belligerent or hostile tone...”
- Pace matters. Firing rapid questions can easily overwhelm a witness. The bench book particularly states that “Questions should not be fired at witnesses”
- A logical, structure approach helps the court and witness alike and is encouraged.
- Repetition of questions often signals that questioning has lost its focus.

In short, good advocacy and humane advocacy are the same thing.

## **Evidence on commission**

29. There is no Court of Session Practice Note specifically for civil proceedings, but the principles set out in **Practice Note No. 1 of 2024 -Taking of Evidence of a Vulnerable Witness by a Commissioner -** are instructive. Although directed at criminal cases, it provides detailed guidance on how evidence on commission should be planned and conducted. It emphasises judicial responsibility for ensuring that questioning is appropriate, proportionate, and trauma-informed. It reinforces the expectation that everyone involved – judges, counsel and solicitors -shares responsibility for ensuring that the witnesses wellbeing is prioritised without compromising fairness.

30. When a vulnerable witness’s evidence is to be taken on commission, careful preparation makes all the difference. Your choice of commissioner is important. They should be provided with the certified copy interlocutor appointing them, a copy of the pleadings and, importantly, a copy of your application under the 2004 Act. The

commissioner needs to understand exactly why the application was made, the nature of the vulnerability and the basis on which the order was granted.

31. Next, arrange for a meeting between the commissioner, both instructing solicitors and counsel. Use that meeting to agree the practicalities and any ground rules:

- The number of days likely to be required
- Venue
- Dress code
- Start and finish times
- Frequency of breaks
- Arrangements for agreed bundles

This is also a good opportunity to discuss any additional measures that might be necessary during the commission for example, a supporter being present or adjusted seating. Getting consensus early avoids unnecessary tension on the day.

32. Practical logistics can often be overlooked, but they matter. There are limited court facilities for the hearing of evidence on commission. Contrary to popular belief, there is no commission suite at Saughton House in Edinburgh. There is a commission room at the Court of Session but this is fully booked many months in advance. That means flexibility and forward planning are essential – don't assume a room will be available at short notice. A neutral venue should be chosen. Venues to consider are ;

- The Faculty of Advocates' MacKenzie Building
- The commissioners room at the Signet Library
- Hotel facilities

33. Because evidence on commission is now recorded, the commissioner does not need to comment on the credibility and reliability of the witness within their report. This would usurp the function of the judge hearing the proof. The commissioner must report on any issues of relevancy and competency raised by parties during the course of the commission. The recording of the commission becomes evidence before the court, so ensuring high-quality recording and clear questioning is paramount.

34. Once complete, the commissioner sends their report directly to the General Department – not to the parties. The recordings of the commission are also sent straight to the Deputy Principal Clerk of Session at the General Department by the company responsible for the recording.

## **Conclusion**

35. Ultimately, recognising and responding to vulnerability helps us to get better evidence. A witness who feels safe, understood and supported, is far more likely to give clear, reliable evidence which will assist the court. Our responsibility as practitioners goes beyond presenting evidence; it extends to ensuring that the evidence can be given. When we take the time to identify vulnerability early, to plan thoughtfully and to adapt our approach with care, we help the court to hear the witness at their best and in doing so we bring out the best evidence.

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