Are the Courts Getting into the Hot Tub?

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From 1st April 2013, the civil courts in England and Wales have been able to hear expert evidence concurrently. In 2016, the Civil Justice Council carried out a study to see what was happening in practice. This article looks at that study, at recent experience and makes some suggestions for the future.

PD35.11 opens the door to concurrent expert evidence and sets out a process which the courts can follow. Essentially, it envisages that the experts are sworn in together; each is invited by the judge to give their views on the first issue; each may be asked questions by the judge; the judge may invite the experts to comment on, and ask questions about, each others' views.

The process is described as a discussion.
Following that process, the parties' representatives "may" ask questions, but this is to be a limited questioning. It is to test the correctness of an expert's view, or to clarify it, but it should not cover ground which has already been covered. Full cross-examination or re-examination is "neither necessary nor appropriate."

There are some themes to this style of hearing evidence:

(i) it is a judge-led (inquisitorial style) approach;
(ii) it is a discussion, focussing on one issue at a time;
(iii) any adversarial element is limited, if not removed altogether.

The decision to hear expert evidence concurrently is at the court's discretion, as is the ability to modify the procedure outlined above.

The CJC report [(1)] was a thorough review, relying on questionnaires and interviews of judges, experts and lawyers. It found that the use of concurrent expert evidence ("CEE") is more widespread than had perhaps been thought, had been used even prior to the appearance of PD35.11 and not just in the civil courts. (The Family Court has used it, as have Arbitrations for some time; the CJC focussed on the civil courts).

The Report makes a number of recommendations; this article looks at the variations of CEE found and at issues of preparation of, and communication with, expert witnesses.

Variations

(i) Sequential back-to-back evidence

The experts are called at the same time and are both sworn in. C's expert is examined, cross-examined and re-examined on issue 1; then D's expert goes through the same process. The same could be applied to a cluster of issues, rather than one at a time. The court can ask questions at any stage. Essentially, this is the usual adversarial process, counsel-led not judge-led. The difference is that it is issue-driven and the parties will have agreed the list of issues to work through and the running order.

(ii) Hot tubbing, or judge-led joint examination of experts

This practice follows PD35.11 as set out above. The theme of the process is the judge-led discussion of the issues

(iii) Hybrids

As seen above, PD35.11 gives the judge a wide discretion to modify the process. The CJC notes that it is a discretion "oft exercised".

The hybrids involve more, or less, involvement by counsel; more, or less, leading from the judge; experts commenting on each other's evidence; experts being invited to question each other on their evidence.

Now, this must be good news as it shows a willingness in the judiciary to adapt the way in which expert evidence is heard, according the needs of a particular case, which is likely to focus more precisely on the issues and so to deal with the evidence more efficiently.

(iv) The teach-in

The court appoints a neutral expert to give high level assistance to the judge before the trial; they do not deal with the specifics of the case, but essentially give the judge a tutorial to aid their understanding of the issues.

The Report's findings are favourable to the use of these different approaches, as appropriate to the needs or issues in each case. One of the issues to have emerged is that of communication with the expert witness, as we shall see from the experience described below.

The reality - one expert witness' experience

Care expert JB, an occupational therapist, is an associate of Somek and Associates. She is a reasonably experienced expert and has undergone comprehensive training in the role of the expert witness, CPR, report writing skills and courtroom skills.

The medico-legal intelligence has indicated that Concurrent Expert Evidence (CEE) has not really been implemented in clinical negligence or personal injury cases with a few exceptions, Judges preferring to stick with the traditional trial. Trials, as we all know, are rare and prior to May 2017 none of Somek and associates' 200 experts had been "hot tubbed". As a consequence training in CEE has been limited and was not felt to be a priority, despite it being a possibility since 2013 as stated in the rules (PD35.11).

So imagine the slight feeling of panic when, upon speaking to her solicitor just a few hours earlier, JB was told she and her counterpart were to be "hot tubbed"!

What actually happened?

JB was warned for court and initially held 5 days Monday to Friday; she was finally informed she would not be required until Wednesday. On Monday afternoon, the call came through asking her to be available at Middlesborough CC at 10am on Tuesday, a day earlier. Thankfully, she was able to sort care for her children and drive to Middlesborough that evening for court the following day, still in the belief that this would be a "normal" trial!

The following morning she was informed that the expert witnesses would be hot tubbed. She knew a little about CEE from a brief discussion on the courtroom skills training and she had read PD35.11.

But what is described in PD35.11 did not happen. What proceeded was a "variation" on that which is described in PD35.11, and we now know that such "variations" are indeed used according to the Judge's preference.

JB and her counterpart (CP) were both asked to take the oath.

JB was directed to the witness stand and CP to the jury box.

What ensued was not the procedure described in PD 11 whereby the Judge, having distilled the issues in dispute from a previously prepared agreed joint statement, asks questions and invites the experts to question one another. What took place took the form of ***"sequential, back-to-back evidence",*** whereby JB and her counterpart underwent examination in chief and cross examination dealing with three issues in dispute:

Issue 1: Task based care v reimbursement for all time family spent at house

Issue 2: Future needs - when paid care would start from

Issue 3: Claimant's care needs in any event

Each of the above was taken in turn with the Claimant's expert undergoing examination and then cross examination on issue 1 followed by the defendant's expert, before proceeding to issue 2. The Judge interjected very periodically.

In other words this was a fairly usual and adversarial trial process, the only differences being the following:

1) Both experts were under oath and therefore were unable to communicate with their own counsel during their counterpart's evidence – to the detriment of counsel I am sure.

2) The issues in dispute were agreed and were the only focus of examination, as opposed to respective Counsel determining their own questions.

3) Each issue in dispute was addressed in turn by the court and both experts, as opposed to the Claimant's expert giving all evidence first, followed by the Defendant's evidence.

4) Both experts were required to stand for the duration, including while the counterpart was being questioned.

This procedure was not explained to the expert witnesses. They were not informed of what they could and could not do e.g. were they allowed to take into the "witness box" a pen and blank piece of paper to take notes during the counterpart's evidence? Were they allowed to participate (as described in PD35.11) by putting a hand up and asking a question of the counterpart or putting an alternative view?

In the nervous panic neither expert thought to ask the court for advice regarding such matters.

We would strongly request that the legal parties advise their experts in advance when CEE will be implemented and give them as much information as possible. Giving oral evidence is always a nerve wracking affair – attending courtroom skills training undoubtedly helps to prepare the expert and calm the nerves, at least in terms of knowing what is going to happen. This all flies out of the window if the process is significantly altered! All parties, court, lawyers and experts, want the best performance of the experts to achieve the best outcome for the case and throwing them rudely into the hot tub as opposed to easing them down the steps while holding a rail, will not help!

JB's assessment of the procedure – well, it made some sense to go through each issue in dispute one by one hearing all evidence, before moving on to the next. It was good to have the three issues in dispute confirmed and to know that this would be the limit of the examination.

It was frustrating not being able to comment on some aspects of her counterpart's evidence and to be able to assist counsel on technical matters of fact. Standing for such a long period caused her to wish she had eaten a more hearty breakfast! Fatigue is not helpful to performance and allowing expert witnesses to sit while listening and giving evidence would seem to be a sensible and reasonable option. Above all JB wished she had been advised of the procedure in advance, in order to prepare and clarify any points of order.

It seems this was not really much of a departure from the normal trial, and rather a long way from Lord Justice Jackson's proposal that Judges should ask the questions, taking a more inquisitorial approach designed draw out the best evidence with greater clarity.

Tips

So, what are the messages for expert witnesses:

1) CEE IS happening

2) CEE is being introduced in a variety of forms – the above being just one

3) Be prepared for the unexpected!

4) When warned for trial, ask to be informed in plenty of time if there is a possibility or likelihood of being hot tubbed

5) Read the CJC empirical study on CEE – or at least Appendices A and C; but note that at the present time these are only recommendations and other variations may be used

6) Watch the EW press for updates on CPR in respect of CEE, which will take on board at least some of the recommendations of the study.

7) Do not simply accept a new procedure that you are not familiar with, without asking questions to clarify the do's and don'ts for you, the expert witness

8) Attend training to familiarise yourself further with the variations of CEE, thus increasing your self confidence

9) Have a good breakfast and make sure water is available – if you need to sit for health reasons, request to do so.

What is clear is that this is an evolving process. In our view, that is undoubtedly a good thing, if the aim is enable the parties, instructing solicitors, counsel, the judge and the experts to focus more precisely on the issues. A mini-inquisitorial process, within the overall adversarial one, is likely to take time to evolve fully and to be understood.

The key is good communication. What happened to JB is not helpful.

The CJC recognises that the judge can decide to use some form of CEE at any stage. They are clear that any order to make use of it should be made as early as possible to allow all involved to prepare properly. They are also clear that any such order should be communicated to the experts by their instructing solicitors "forthwith" – not simply on arrival at the hearing. They recommend that the rules be amended accordingly.

Our aim in writing this article is to encourage the use and development of CEE by the courts and to encourage experts and their lawyers to maintain clear and quick communication as they do so.

Good Luck!

Postscript

After this article had been submitted, an article appeared in litigationfutures (27June 2017), with further action from the Civil Procedure Rules Committee ("CPRC").

Following the CJC study, a CPRC sub-committee has been considering whether to amend PD35.11 and whether to include all the CEE variations. The CPRC has decided to opt for the classic CEE (the pure hot tub), as set out in the current version of PD35.11.

The CPRC also endorsed greater use of hot tubbing, saying that it would be beneficial for it to "become, increasingly, a normal feature of expert evidence in all courts".

The expectation is, therefore, that the variations cease and that, if the evidence is deemed suitable for CEE, it will be in the hot tub.

Reference

1, Civil Justice Council, Concurrent Expert Evidence and "Hot-Tubbing" in English Litigation since the "Jackson Reforms", A Legal and Empirical Study, 25th July 2016.

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