Do you want to try the Hot Tub?

If you are a member who either undertakes expert witness work or are considering undertaking such work, then you may be interested to hear about possible developments which may affect the way in which you give evidence in court in the future.

Lord Justice Jackson produced a very detailed review of litigation costs in his final report published in December 2009. Whilst the report is a lengthy document, running to some 557 pages, there are only two recommendations which relate to expert evidence. The first suggests that CPR Part 35 or its accompanying Practice Direction should be amended in order to require a party seeking permission to rely on expert evidence to provide an estimate of the costs of that evidence to the court. By way of background "CPR" relates to the Civil Procedure Rules and Part 35 of those Rules governs Expert evidence.

The second suggests a pilot is undertaken in respect of "*concurrent evidence*" and if the results are positive then consideration should be given to amending CPR Part 35 to provide for its use in appropriate cases.

Concurrent evidence developed in Australia in the late 1990s and is commonly referred to as "*hot tubbing*". A similar procedure has been used by arbitrators in arbitration for a number of years. I was myself involved as an expert in litigation case prior to Lord Justice Jackson's report where hot tubbing was suggested. Unfortunately the parties in this case failed to agree on the process being adopted. I suspect this was more due to ignorance rather than any concerns with how the process works. So what is hot tubbing?

In suitable Australian litigation cases evidence is given by various experts at the same time who are all sworn together. They sit in the court room where the judge chairs a discussion between the experts, designed to assist the judge understand the perspective of each expert, and then ultimately resolve the issues that the experts have given evidence about.

Compare this with the traditional way expert evidence is dealt with. Counsel for each side cross examine is the opposing party's expert. Counsel isn't trying necessarily to get to the truth, but is attempting to put his client's case across, which involves doing his best to undermine the credibility of the opposing party's expert.

I shall digress for a moment. Judges often have difficulty in placing reliance on some expert evidence. This is not a new problem. In a judgement dating back to 1877 (Thorn v Worthing Skating Rink Co) the judge referred to the practice of both parties going to half a dozen experts (all of which gave their honest opinion) until they found an expert whose view supported their case, leaving alone those who didn't support their case. The judge referred to one case where

he knew a party had gone to 68 people before finding an expert who supported their case. The judge went on to state in his judgement that he had "*always had the greatest possible distrust of scientific evidence of this kind*…"

Whilst an expert may genuinely hold a particular opinion which supports his client's case, he has no way of knowing how many other experts have been approached who may hold a contrary view. It is little wonder therefore that the above judge had his concerns. I suspect the above practice of seeking out an expert whose opinion supports their case may well still be adopted by some parties today. Add to this the occasional bad apple (an expert who shamelessly tailors his expert evidence to support his claims case – a "*hired gun*"), it is little wonder that experts still come in for criticism today.

An expert is an expert in his chosen field; however, he/she may not always be skilled at presenting their opinions to the tribunal (judge or arbitrator). Experts can, on occasions, be lambs to the slaughter when faced with skilful cross-examining. This problem is certainly likely to get worse as fewer cases come to trial and experts have fewer opportunities to expose themselves to (and gain experience from) the rigors of the courtroom.

An Expert's duty is to help the court. It could be said that the current procedure does not allow the experts to do this as well as he/she could since the opposing counsel is only concerned with undermining the experts evidence, regardless of its merits.

So let's look at what hot tubbing has to offer. Prior to the trial the procedure is pretty much unchanged, with expert's reports being exchanged and expert's meetings taking place. The expert's joint statement, setting out what has been agreed and what has not been agreed, is often used as an agenda. From here each judge will no doubt to deal with each case differently.

A video produced jointly by the Judicial Commission of New South Wales and the Australian Institute of Judicial Administration shows the experts sitting together in something similar to a jury box with pen and paper to hand. The judge asks the experts questions and the experts take it in turn to answer the judge's questions. Counsel is then invited to ask questions of any expert on that particular issue. The procedure allows each expert to ask questions of each other, and to respond to each other's questions. In other situations the experts could lead the investigation by asking questions of each other, with the judge and the counsel asking their own questions as appropriate.

It has been said that tensions fall away and the quality of the evidence improves. Indeed experts involved in the process in Australia have said that the procedure was more like an enquiry into the truth and that they were better able to fulfill their obligations to the court.

It is suggested that hot tubbing has a number of advantages, these include:

- It saves both time and costs. Instead of counsel turning round to take whispered instructions during cross-examination, counsel can now put his questions to the experts in the hot tub. Both/all experts can then deal with that particular point.

- Experts can properly help the court to resolve disputes

- Hot tubbing does away with the "*one on one*" gladiatorial combat between cross-examining counsel and each expert

- From the experience of the Australian courts, it would seem that overall, the procedure works well, especially where the experts know and respect each other.

I would add to this the significant advantage that very technically complex issues can be resolved one by one, rather than hearing all the evidence from one expert on one day (or over several days) followed sometime later by the evidence from the other expert(s). The delay between hearing evidence on the same issue from subsequent experts can, on occasions, be quite substantial. There is also the danger in the present process that it may be necessary to recall an expert to hear from him on a point raised by a subsequent expert, which was not covered in an earlier expert's evidence. This can on occasions be problematic and certainly adds to the length and cost of the trial.

On the downside it has been suggested that the cost savings of introducing hot tubbing may not justify the increased risk of a case collapsing due to a bad performance of an expert under pressure because he requires particular skills to deal with this type of forum. I personally think that there is a far greater risk of an expert collapsing under the pressure in the current system due to its very confrontational nature and that this risk will increase as the number of opportunities for an expert to give evidence in court (and gain experience) reduces. I have no doubt that experts who have undertaken expert witness training are fully able to withstand the pressures placed upon them in the current system. By contrast hot tubbing will allow the expert more opportunity to express the reasons for his/her opinion and to highlight deficiencies in his opponent's opinion. Admittedly the expert who has additional presentational skills beyond his technical expertise will perhaps have the edge, however, that will be the case which ever procedure is adopted.

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All the information I have seen on hot tubbing refers to concurrent expert evidence. I see no reason why, in appropriate cases, this should not be extended to witnesses of fact.

The situation could very easily get out of hand where there are several experts and numerous witnesses of fact, however, where the number of experts and witnesses of fact are limited, and the expert evidence is heavily dependent on the factual evidence, then perhaps the procedure could be extended to include witnesses of fact, whereby both witnesses of fact and experts are sworn together and take part in the round robin enquiry. The experts could then make enquiries of witnesses of fact, which at present can only be made through passing notes forward to counsel, to assist them in reviewing their opinion. At present the answer given by a witness of fact may lead to a series of further questions which could be dealt with far more efficiently by the expert. The experts will have to be careful that they do not stray into the role of advocacy, since this has to be avoided at all costs by the expert. Advocacy is the preserve of counsel, and rightly so.

If hot tubbing is introduced into litigation in the UK then no doubt experts will need to undertake appropriate training. We may also see an increase in the number of highly technically qualified professionals prepared to put themselves forward as experts, which must be of benefit to the process. There may also (hopefully) be a significant reduction in the number of expert hired guns, since there will be no hiding place for them in the hot tub!

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