Concurrent Expert Evidence: Whatever Happened to 'Hot Tubbing'?

Posted On: 08/01/2024
Author: Andrew McNamara

After the introduction of the reforms to the Civil Procedure Rules in 2013, you may recall some judges becoming, at least initially, excited about the prospect of experts giving evidence concurrently (so-called "hot tubbing"). Since that early flush of excitement, I have been involved in only one trial in which it was used and I do not recall either seeing a single set of directions ranging over complex personal injury, clinical negligence and disease litigation that required it, or a single judge who insisted upon it occurring in the intervening decade.

Your reflection may be wholly different, but it is this writer’s experience (and that of a number of my colleagues) that it seems to have become a largely forgotten concept in the world of personal injury, and one wonders why this has come to pass: is it because it is a bad idea; or is it because we, as lawyers, and in particular as advocates, remain suspicious of relinquishing control to judges, thereby risking the opportunity that we cannot frame the expert narrative in closing?

35PD.11 provides (11.1):

At any stage in the proceedings the court may direct that some or all of the evidence of experts from like disciplines shall be given concurrently.

The court can direct how, or in what order, the evidence is to be given (11.2); and can set an agenda, or direct that the parties prepare such an agenda (11.3).

In the event that the court does direct that there shall be concurrent evidence, 11.4 goes on:

Where expert evidence is to be given concurrently, then (after the relevant experts have each taken the oath or affirmed) in relation to each issue on the agenda, and subject to the judge's discretion to modify the procedure –

(1) the judge will initiate the discussion by asking the experts, in turn, for their views in relation to the issues on the agenda. Once an expert has expressed a view the judge may ask questions about it. At one or more appropriate stages when questioning a particular expert, the judge may invite the other expert to comment or to ask that expert's own questions of the first expert;

(2) after the process set out in (1) has been completed for any issue (or all issues), the judge will invite the parties' representatives to ask questions of the experts. Such questioning should be directed towards:

(a) testing the correctness of an expert's view;

(b) seeking clarification of an expert's view; or

(c) eliciting evidence on any issue (or on any aspect of an issue) which has been omitted from consideration during the process set out in (1); and

(3) after the process set out in (2) has been completed in relation to any issue (or all issues), the judge may summarise the experts' different positions on the issue and ask them to confirm or correct that summary.

The Woolf reforms that gave rise to the creation of CPR Part 35 in 1998 considered the widely held belief that expert evidence was seen as entrenched and tendentious: both sides of the divide instructed 'their' experts and few crossed the no-man's land of litigation in between. Hence CPR Part 35 introduced: the wording of the experts' declaration, as a reporter to the court rather than those responsible for paying their bill; the joint statement of issues; and the embracing of the single joint expert. Rhetorically, however, you may wonder what has changed.

So, given that the CPR imbued the court with beefed up case management powers in a world where it was thought that litigation was a byword for delay and experts hostile to one another, and that 35PD.11 is particularly muscular in the power granted to the court, why does concurrent expert evidence appear to be largely unused?

I hesitate to suggest that it is because it is a bad idea since the judicial perception is summed up by Fordham J in the case of *R (Richards) v The Environment Agency & Walleys Quarry Ltd* [2021] EWHC 2501 (Admin) (the decision in relation to expert evidence not being affected by the subsequent appeal):

The hot tubbing process gave me real assistance in understanding what the two experts were saying to me, and where the areas of difference in their expertise and in their opinions lay. The process, together with the submissions on all sides, assisted me in crystallising the topics that really matter and the key evidence in relation to those topics. A significant part of my discussion of the context will involve considering that evidence (see §§7, 19-31, 35), which evidence – alongside the other evidence in the case – will inform the ultimate analysis (§§55-63). The hot tubbing process also enables me to try to address ideas and opinions, explained to me by distinguished experts with whom I had a direct interactive discourse, in a particular way: using non-technical and down to earth language. That promotes accessibility. It also involves transparency, laying bare how I understood the essential messages in what I was told by the two experts.

Although a judicial review matter, that case involved complex evidence regarding exposure to hydrogen sulphide and its impact upon the respiratory function of the child applicant: a not unusual scenario for personal injury lawyers.

Is the alternative that it is perceived as inimical to the interests of justice? Certainly in the case in which I was involved our opponent was hostile to the idea but that one experience cannot be definitive.

One cannot help but conclude that, despite some judicial enthusiasm, lawyers in personal injury litigation have been able to steer cases towards the classically adversarial, rather than the more inquisitorial style that hot tubbing brings. It is perhaps no coincidence that of the three positive responses from my colleagues regarding the use of hot tubbing, two were based upon successful use in inquests.

Nonetheless, given the judicial hostility that one generally faces in relation to time estimates and the 'proliferation' of experts at the case management phase, it is surprising that the views of the likes of Ryder J, as he then was, expressed prior to the Jackson reforms, have not gained greater momentum over the ensuing 12 years, especially in the light of potential time and cost savings (*A Local Authority v A* [2011] EWHC 590 (Fam)):

The three experts commissioned to analyse the key issues were heard in oral evidence by the court. Not for the first time this court was very greatly assisted by hearing their evidence concurrently. A device unfortunately and colloquially known as 'hot tubbing' was used with the agreement of all parties. This process has been tested in America and Australia but not in this jurisdiction. Out of the experts' reports and discussions the court derived an agenda of topics which were relevant to the key issues and to which counsel were asked to contribute. The witnesses were sworn together and the court asked each witness the same questions under each topic, taking a topic at a time. The experts were encouraged to add or explain their own or another's evidence so that a healthy discussion ensued, chaired by the court. Each advocate is permitted to examine or cross examine and where appropriate re-examine each witness after the court has elicited evidence on a topic.

The resulting coherence of evidence and attention to the key issues rather than adversarial point scoring is marked. The evidence of experts who might have been expected to fill 2 days of court time was completed within 4 hours. The evidence can conveniently be described under themes into which I have interpolated some of the written evidence which was not disputed in cross examination.

Of course, the family court is very different in approach to the average personal injury trial. One is rarely likely to be conciliatory with an expert whose opinion is antithetical to one's case; and although it is easy for judges to criticise by using phrases such as '*adversarial point scoring*', robust cross examination of an expert with whom one disagrees remains the gold standard in an adversarial system.

Ultimately, it seems anomalous that hot tubbing has failed to take hold in the field of personal injury: it has the triple attraction of judicial enthusiasm in other areas of practice; reduced time estimates; and reduced costs. On those assumptions, one would have thought that both case management and trial judges would have been cheerleaders for the hot tubbing approach.

This leads me to a concluding thought. Ironically, one doubts that the extension to the fixed costs regime will be accompanied by comparable judicial antipathy, especially in the light of the creation of the intermediate track.

Allowing for the kind of vigour that tends to accompany reforms to the costs rules, one wonders if hot tubbing is due for a resurgence in popularity? After all, CPR 26.9(7)(c) provides that a claim can be allocated to the intermediate track if:

the court considers that –

(i) if the case is managed proportionately, the trial will not last longer than three days;

(ii) oral expert evidence at trial is likely to be limited to two experts per party; …

Clearly, to date, hot tubbing in personal injury cases has defied judicial enthusiasm in other areas of practice. The provisions of Part IV of CPR Part 28, and in particular CPR 28.14, do not appear to anticipate that hot tubbing may become a standard feature of trial time management. Therefore, it remains to be seen whether concurrent expert evidence is to be left in the shadows or brought into the light.