DEVELOPMENTS IN THE FIELD OF EXPERT EVIDENCE:

EXPERTS IN HOT WATER

Adrian Palmer QC, Guildhall Chambers
9th June 2011

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The inexpert expert:

Jones v Kaney

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The facts of the case:

- RTA -14 March 2001.
- Dr K instructed for C - May 2003.

July 03 report: … *C had symptoms leading to diagnosis of PTSD.*

Dec 04 report: … *still suffering depression and some symptoms of PTSD.*

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The facts of the case:

- Discussion and joint statement - Nov 05:

"....Both experts agree that [C's] psychological reaction after the accident was no more than an adjustment reaction that did not reach the level of [any] psychiatric disorder"

".....Dr K has found [C] to be very deceptive and deceitful in his reporting ……."

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The facts of the case

- Discussions between C's solicitors and Dr K
  …… *Dr K's explanation.*
- Court refused to allow C to instruct a different expert.
- Case settled for reduced sum.
- Claim started against Dr K - April 2009:
  a. Negligence lay in signing joint statement.
  b. Claimed damages equivalent to undervalue.

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The current situation

- SC allows claim to proceed.
- What is the correct approach to quantum?
  a. Damages equivalent to undervalue? Or
  b. Unnecessary costs?

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The possible effects

- Ld Brown at [67]: “Sharpened awareness”
- One particular area of silence: The single joint expert:
  a. Difficult to distinguish his case?
  b. Twice the risk of disappointment?
  c. Measure of damages = undervalue because (ex hypothesi) his view has been followed by the court?

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The hidden expert

Edwards-Tubb v Wetherspoon

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General proposition:

It is eminently reasonable that, if a party wants to rely on expert evidence at trial, he should disclose all the expert reports that he has received during the litigation process, not merely the report(s) of his own choosing.

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Pre *Edwards-Tubb*

- The general proposition has applied to D for many years, even before *Beck* in 2003. Goes back to at least 1972 and *Lane v Willis* CA.
- The reason for it applying to D but not C was simple, namely that the court had a mechanism or "vehicle" whereby to require disclosure by D.
- Same restraint did not apply to C.

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The earlier cases

***Beck* 2003**: CA effectively only re-affirmed that approach. Still no restraint on C.

***Vasiliou* 2005**: Something of a distraction. CA did not impose condition onto D, but that was because D did not need C's cooperation to produce the further report (it was not a p.i. case) and D had benefit of an existing an "open" direction for expert evidence.

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Edwards-Tubb v Wetherspoon

Accident	Oct 05
Letter before action (naming 3 experts including Jackson)	9 Nov 06
Response letter (no objection raised)	16 Mar 07
Jackson report 1	4 May 07
Khan report	14 July 08
Proceedings issued (+ P of C & report by Khan, not named and including ref to earlier report)	8 Oct 08

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Edwards-Tubb v Wetherspoon

- CA imposed condition of disclosure onto C:
  a. It had the vehicle to do so: C needed permission to call any expert - Pt 35.4
  b. It could require disclosure of any report that had been obtained for purpose of proceedings.
- **Result:** Whenever C needs permission for expert, that occasion can and should be used to ensure that any other litigation report(s) are also disclosed.

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The practical steps

- More than ever, D should seek for permission orders to include names (accepting that that will apply to D as well as C).
- Before the all-important first order for permission, standard form letter:……

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The practical steps

"Before we consent to any proposed grant of permission for expert evidence, please will you confirm that you have not obtained any report or reports for the purpose of these proceedings from any expert or experts in any of the proposed fields of expertise other than those individuals to be named in the proposed order. If you have obtained any such report(s), please confirm that you will disclose them at the same time as disclosure of the reports from your named experts and that you will consent to a term in the order to that effect."

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The concurrent experts: Hot tubbing

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Jackson Final Report, December 2009

Recommendation 80:

"The procedure developed in Australia, known as 'concurrent evidence' should be piloted in cases where all parties consent. If the results of the pilot are positive, consideration should be given to amending CPR Part 35 to provide for use of that procedure in appropriate cases."

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Two subsequent developments

- *June 2010:* Pilot at Manchester Civil Justice Centre started, for Mercantile Court and TCC. On voluntary basis; for 18 months.
- *Oct 2010:* TCC Guide 2nd Ed, para.13.8.2 included concurrent evidence as a possible way of presenting expert evidence (amongst others). Including:

".. the judge will consider whether, in the absence of consent, any particular method of concurrent evidence is appropriate in the light of the provisions of the CPR."

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Manchester Guidelines

- If experts do not share mutual respect of expertise and independence, constructive "discussion" unlikely.
- Joint statement takes on greater significance:
  a. Must identify each area of disagreement clearly and separately, by reference to heading and number.
  b. Each expert's position must be set out in respect of each area of disagreement, with reasons.
- Experts to use jury seats.
- Single microphone.

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Suggested developments

Even under existing CPR:

- Developments in procedure during years to date.
- Easily "slice" evidence into issue by issue.
- Small step further to keep both experts in position in front of court and judge to manage questioning.

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The Australian model:

http://www.youtube.com/view_play_list?p=9FA9DBF001E383EC

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