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Number 10 December 2019

Albion Chambers INQUEST TEAM NEWSLETTER

Jackson's hot tub

If one can dispel the image that is immediately conjured of a convivial group of experts sipping gin cocktails whilst immersed in the warm of embrace of an ebullient spa, 'Concurrent Expert Evidence', 'witness conferencing' or 'hot-tubbing,' as it is vernacularly known, is a device that arguably warrants greater popularity than it currently enjoys. Originally an antipodean device, where it was first used in the Competition Tribunal before being adopted in the Supreme Court of New South Wales, it is now widespread in Australia and used beneficially across a number of disciplines.

In the courts of England and Wales, though, it has been used with limited enthusiasm, despite being applicable to a number of different areas of law and is gaining favour in arbitration. The Jackson LJ lecture *"Concurrent expert evidence and "hot-tubbing" in English litigation since the "Jackson reforms": a legal and empirical study*, produced in June 2016, identified eight distinct areas of use including family disputes and motor accidents. In April 2019, the Chartered Institute of Arbitrators (CIArb) branch in Singapore published guidelines on hot-tubbing, the first set of guidelines of its kind. Arguably though its greatest potential application must be at inquests.

Paragraph 11.4 of the Practice Direction to CPR, r. 35, provides the mechanism for the hot-tubbing of expert witnesses who will be giving evidence on 'like disciplines". Broadly, the procedure set out within the Civil Procedure Rules imports (subject to the judge's discretion) the approach that is intrinsic to the inquisitorial process; the judge initiates the discussion, asks questions of the experts and invites their views on the evidence of the other expert. At the conclusion of this stage either parties' representatives are permitted to ask questions. Uncomfortably for the stalwart civil litigator perhaps, there is no cross-examination of the expert.

However, in the coronial-led arena of the inquest such a position is the norm. Rule 21 of the Coroners (Inquests) Rules 2013 embodies that procedure, albeit in a more succinct form. Questions are asked first by the Coroner, interested persons next and then finally the witnesses' representatives themselves. The ethos of paragraph 11.4 of the PD to CPR 35 seems to align itself (almost) fully with Rule 21. Surely we should see it used more then?

In his lecture Jackson LJ endorsed the concept, identifying its positive effects on the quality of evidence given by the experts (83% of the judicial respondents considering this to be the case) and also saving time. Ryder J in *Re Baby X* [2011] EWHC 590 (Fam) [22]-[23] considered that the time required to hear expert evidence had been truncated from two days to four hours by using 'hot-tubbing'. In *Streetmap.EU Ltd v Google Inc* [2016] EWHC 253 (CH) [47] Roth J identified a 50% reduction in the time required to adduce evidence. Seemingly giving support to the 'Einsteinian' premise that time is relative to its observer, practitioners were less enthusiastic as to the savings that could be made here, with only 56% forming that view.

Statistics aside, there are certainly potential advantages to the use of hot-tubbing. On the one hand there is a narrowing of the issues between the experts, although there is often a tension between the objectively identifiable emotional need for the deceased's family to proceed through an inquest as quickly and smoothly as possible, and their desire to un-turn every stone; such narrowing of the issues and increased clarity can only be beneficial. The platform for a more collegiate discussion between experts can only assist in achieving a more thorough understanding of the issues at hand. In consequence, where appropriate, hot-tubbing offers distinct time and costs savings at the inquest, as well as offering greater clarity of understanding as to fact and circumstance. Inquests, as we know, are not purely inquisitorial or purely adversarial and the non-partisan nature of the coronial court lends itself entirely to evidence being given in this manner.

Conversely, however, the prospect of giving evidence in tandem with someone who may have a contrary view to that of your own may actually be more daunting than the thought of being cross-examined by counsel. Additionally, to ensure that the hot-tubbing is as effective as possible, greater effort in terms of preparation may be required to ensure the best possible use of this time. This may have the effect of negating any cost saving that could be achieved if each expert were questioned on an individual basis.

Whether hot-tubbing is appropriate, however, will ultimately be determined on a case-by-case basis. Where there is clear overlap either in terms of the chronology of facts and/or expertise, the questioning of experts in such a way would seem to be entirely appropriate. The discursive manner in which evidence can thereby be obtained limits the potential for defensive or opaque responses from experts. Certainly, there was relative unanimity between judicial and practitioner observations in this regard, with some finding that experts were left feeling that they were 'assisting' rather than defending their respective positions. A palpable sense that the quality of evidence was improved was observed.

Hot-tubbing remains at its nascent stages as far as civil proceedings go. The

uptake has been inversely proportional to its potential benefits in my view. Whether this is simply due to the unwillingness of practitioners to embrace change, as opposed to some practical failing of the process, is unclear.

In the coronial system there seems to be more utilisation of this process, but it still remains somewhat of an afterthought or is advanced by the coroner when proposing a timetable just prior to the commencement of the inquest. Whether you are in or out of the tub, the possible financial and temporal savings warrant its early consideration and, where appropriate, employ.

Darren Stewart

Are you sure?

R (on the application of Maughan)

Avid readers of the Albion Chambers Newsletter will be familiar with the case of *R (on the application of Maughan) v Her Majesty's Senior Coroner for Oxfordshire (Chief Coroner of England and Wales and another intervening)* [2019] 3 All ER 567, although maybe only in its High Court guise.

I will not regurgitate the facts, but the central issue that came before the court was the standard of proof in respect of conclusions of suicide. The High Court found that it should be the balance of probabilities. Unfortunately, their conclusion cast doubt on the position with respect to unlawful killing and caused some furore as to whether the civil standard would also apply.

Davis LJ gave the leading judgment for the Court of Appeal earlier this year. The key questions for the court were:

(1) Is the standard of proof to be applied the criminal standard in deciding whether the deceased deliberately took his own life intending to kill himself?

(2) Does the answer depend on whether the determination is expressed by way of short-form conclusion or by way of narrative conclusion?

Helpfully for practitioners, the Court of Appeal also explicitly dealt with the question of unlawful killing (albeit obiter), noting the call from the Coroner's office for clarity on the topic.

Whilst the Senior Coroner for Oxfordshire and the Chief Coroner maintained neutral positions, the appellant (the deceased's brother), argued that the criminal standard of proof should apply to both suicide and unlawful killing. The charity INQUEST advocated that both should attract the same standard of proof. However, the parties were united in their thinking that the standards of proof for a short form and narrative conclusion should be aligned.

Davis LJ agreed with this, stating at paragraph 71 "there seems a very real inconsistency in adopting a criminal standard of proof for a short-form conclusion but a civil standard of proof in a narrative conclusion," and that therefore, they should apply consistently.

As to what standard, he upheld the High Court's decision, that the civil standard applied before a conclusion of suicide could be reached. He noted that "the underpinning rationale for the need to have a criminal standard of proof in criminal proceedings simply has no obvious grip in inquest proceedings, given their nature" (paragraph 74). An inquest is designed to be "expansive" rather than restrictive. Davis LJ felt that a civil standard enhances the prospect of lessons being learned.

Davis LJ is clear that the fact that suicide is not a crime is also important. Watkins LJ observed this too in *R v West London Coroner, ex p Gray* [1987] 2 All ER 129, yet concluded that it is "a drastic action which often leaves in its wake serious social, economic and other consequences," for which it would be "unthinkable" that anything less than the criminal standard would do.

What then of unlawful killing? It clearly involves criminal activity and indeed as Davis LJ noted, is essentially confined to homicide, which gives it a special quality requiring the criminal standard. He reminds the court that, for example, "causing death by dangerous or careless driving cannot justify a conclusion of unlawful killing at an inquest: see *R (on the application of Wilkinson) v HM Coroner for the Great Manchester South District* [2012] EWHC 2755 (Admin) (2012) 176 JP 665" (paragraph 93). So, for the moment, unlawful killing retains the criminal standard.

Permission has been granted to appeal to the Supreme Court, and it is expected that the court will agree with the Court of Appeal with the possibility of it giving further clarity (potentially ratio rather than obiter) of the standard of proof to be applied in unlawful killing. However, in any event the Court of Appeal has explicitly recommended that the Chief Coroner should address the Guidance and Coroner Bench Book, and the notes to Form 2, currently appended to the Coroner's rules "as a matter of expedition" (paragraph 89). This has not happened yet, so practitioners must be particularly alive to this lag when drafting their submissions.

Emily Heggadon

Afford an expert's report? Hardly privileged

A review of Linda *Ketcher v Coroner for Northern Ireland* [2019] NIQB 4

Over the past ten years or so a trend has become discernible where parties who face (or intend to pursue) civil proceedings associated with the death subject to an inquest will front-load their preparation, with the hope of gaining a favourable outcome from the coronial process. Then, later, they claim those costs back as part of the civil proceedings.

A good example of this in action is the very recent case of *Fullick v The Commissioner of Police of the Metropolis* [2019] EWHC 1941 (QB), 25 July 2019. The judgment merits an article of its own as it covers a wide range of issues associated with costs and inquests, which unfortunately fall outside the scope of this article.

But this trend also has had other knock-on effects – for instance those parties (the erroneous but convenient use of the word 'parties' for participants in inquests is acknowledged) that can afford it (or those parties who think someone else will pay for it in the future) are now commissioning their own experts, to assist them in conducting their case in the Coroner's court. These experts

are often used to guide an advocate's 'cross examination' (obviously with the usual caveats of questioning and tone, as appropriate).

The instruction of such experts was traditionally based on the assumption that it can be kept close to the owner's chest. If the report was really good, the contents would be repackaged in the form of zinger questions fired at the Coroner's appointed expert, to exert maximum leverage. Similarly, if the particular report is really really good, the decision could be made to disclose the entire report to the coroner, eulogise as to its merits and invite the coroner to call the expert as their own. Conversely, if the report was unhelpful to the client's position, it may never see the light of day; after all, it would be subject to litigation privilege.

Why wouldn't you obtain such an expert's report if you could afford it?

Is the report subject to litigation privilege?

The first thing to note is that *Ketcher*, the subject of this article, is a Northern-Irish case. Therefore, in terms of the domestic jurisdiction it would be persuasive only. Nevertheless, unless or until a decision to the contrary is handed down, it probably bites and our clients should be advised of the risks.

The facts of the case are very sad – concerning the deaths of soldiers whilst in the military – but do not assist us any further in terms of this article. The bold headline from this authority is that *litigation privilege does not apply* if the report was *prepared for the purposes of the inquest*. The short version of the rationale is that because the inquest system is 'inquisitorial' it cannot be 'adversarial' and so 'litigation' privilege cannot apply. A detailed analysis of the cases of Three Rivers and Waugh also falls outside of the scope of this article but they are useful touchstone cases to go back to once in a while. They will certainly assist in fleshing out the court's rationale in *Ketcher*.

What next?

Assuming for a moment that the expert's report was prepared for the purposes of the inquest (and timing may be an important issue in that determination), one simply falls back on the usual 'relevance test'. Is the report relevant to the inquest? If so, it must be disclosed – CJA 2009 Sch 6 para 7.

Richard Shepherd

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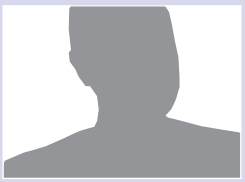

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