A HOT TUB FOR EXPERT WITNESSES

THE HON. MR. JUSTICE PHILIP O'SULLIVAN*

I have recently finished trying my first medical negligence case. It concerned a thirteen year old profoundly disabled girl who sued her mother's obstetrician for failing to conduct timely ultrasound scans during pregnancy which, she claimed, would have revealed the need for urgent caesarean section which would have prevented her injuries. The obstetrician admitted negligence because he had not done the scans but claimed that her injuries were caused by an event in her mother's pregnancy which occurred before the scans should have been performed. The scans, he said, would have been too late. The issue was causation and it boiled down to a question of precise timing, namely whether or not the plaintiff would have been spared her injuries had she been delivered before the 35th week of gestation.

Five eminent witnesses were called to deal with this question. There was a paediatric neurologist, a paediatrician with special interest in early childhood and, thirdly, the holder of the only chair in the world on child nutrition for the plaintiff and for the defendant a paediatric neurologist and a radio-neurologist. This does not include the two gynaecologist-obstetricians called for the plaintiff whose uncontradicted evidence was that there should have been scans and a delivery by the 35th week.

All of these witnesses were supremely well qualified and indeed it made me fell very small to be confronted with experts whose CVs were thicker than yesterday's transcript. I found myself moaning to my colleagues about the impending task before me but they, who have more experience than I, assured me that ours is the best system anyone has devised to date. Accordingly my task was to apply the rules of probability to two eminently distinguished and coherent bodies of evidence which were in mutual conflict. Also disconcerting was the thought that the better witness might not have been the better medical opinion but my task was to apply those rules to the

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evidence.

I admit, with some embarrassment, that I did not derive too much assistance from the following dictum of Finlay C.J. from *Best v. Wellcome*[1]

> I am satisfied that it is not possible either for a judge of trial or an appellate court to take upon itself the role of a determining scientific authority, resolving disputes between distinguished scientists in any particular line of technical expertise. The function which a court can and must perform in a trial of a case in order to achieve a just result is to apply commonsense and a careful understanding of the logic and likelihood of events to conflicting opinions and conflicting theories concerning a matter of this kind.[2]

Counsel on both sides of my case told me that this was the definitive statement of the law on the topic. What exactly does it mean? Clearly the first part means that the judge is not to attempt to resolve a professional dispute between experts. So what does the judge do? He applies commonsense and a careful understanding to the expert evidence. I did this as best I could but I have to say my supply of commonsense told me that there was no easy or obvious solution and I was left feeling like an intellectual pygmy looking up at two giants: from that vantage point one simply cannot tell which of them is taller. Clearly the above dictum does not mean that one sets aside the expert evidence and goes solely on one's own commonsense and logic. Not much help there, really. If a judicial figure such as Finlay C.J. – no mean expert himself – leaves the matter as he did then it reinforces my feeling that ours is a frail and inadequate methodology.

Add to the foregoing the fact that all except one of the witnesses referred to came from abroad including from Sweden, Canada and the U.K. and were able to attend on specified days for limited periods of time only (one came twice) and it can easily be seen that a difficult

[1] [1993] 3 I.R. 421 (S.C.).
[2] [1993] 3 I.R. 421 at 462 (S.C.).

trial could become cumbersome or even worse. For example there must be a high risk that counsel for the defendant omits to put something to one of the plaintiff's witnesses which is or turns out to be material to the issue. This can entail an application by the plaintiff late in the trial for a recall of that witness who may or may not be able to attend at the convenience of the legal process whence the possibility of further delay. Furthermore an effective cross-examination will have a significant impact on a judge's deliberations at the conclusion of the case and may, I suspect, produce a disproportionate result on a witness who is not particularly adroit in the box but who may nonetheless have the better medical opinion. As I said above, however, judges try the case on the evidence.

This brings me to the *hot tub*. This is an arrangement developed first by the judge in charge of the Australian Competition Tribunal whereby the opposing experts sit at a table on their own, without intervention, initially, from lawyers, and debate the issue between themselves. Having had the experience which I described above I recalled first learning of the *hot tub* from an Australian colleague, The Hon. Mr. Justice Peter Heerey of the Federal Court of Australia, during his stay in Dublin on sabbatical (God save the mark!). The Hon. Mr. Justice Heerey delivered a paper to the Copyright Society of Ireland two years ago which was subsequently published in the *Bar Review* for January/February, 2002.[3] I can do no better than quote from what he said in that article:

> This procedure involves the parties' experts giving evidence at the same time. Written statements will have been filed prior to trial. After all the lay evidence on both sides has been given, the experts are sworn in and sit in the witness box – or at a suitably large table which is treated notionally as the witness box. They do not literally sit in a hot tub. Constraints of propriety and court design dictate a less exciting solution. A day or so previously, each expert will have filed a brief

[3] The Hon. Mr. Justice Peter Heerey, "Expert Evidence: The Australian Experience" (2002) 7 *Bar Review*, 166.

> summary of his or her position in the light of all the evidence so far. In the box the plaintiff's expert will give a brief oral exposition, typically for 10 minutes or so. Then the defendant's expert will ask the plaintiff's expert questions, that is to say directly, without the intervention of counsel. Then the process is reversed. In effect, a brief colloquium takes place. Finally, each expert gives a brief summary. When all this is completed, counsel cross-examine and re-examine in the conventional way.[4]

Mr. Justice Heerey went on to say that in his experience this brought about a number of benefits which included that the experts gave evidence when the issues had been refined and defined so that the area of real dispute was narrowed to the minimum, the judge sees the experts together and "does not have to compare a witness giving evidence now with the half-remembered evidence of another expert given perhaps some weeks previously, and based on assumptions which may have been destroyed or substantially qualified in the meantime",[5] the physical removal of an expert from his party's camp to the proximity of a (usually) respected colleague tended to reduce partisanship and obviously it could save a lot of hearing time.

I would add that it would probably eliminate the possibility of a late application by the plaintiff to have his expert recalled because the defendant's counsel did not put a vital point to him.

Mr. Justice Heerey went on to say that the Bar did not like the system – at least initially. Does this of itself prove that it must be a good thing, I ask? The Australian Bar adapted, at least the better ones did.

Obviously I could not use the *hot tub* in my case because the rules, if not more, would need to be changed. But I suggest they should be. Indeed, I think we are creeping towards it with the new disclosure arrangements and the new general anti-ambush philosophy underlying them. Indeed, I think this philosophy also

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[4] The Hon. Mr. Justice Peter Heerey, "Expert Evidence: The Australian Experience" (2002) 7 *Bar Review*, 166 at 170.

[5] The Hon. Mr. Justice Peter Heerey, "Expert Evidence: The Australian Experience" (2002) 7 *Bar Review,* 166 at 170.

underlies the recent Supreme Court decision in *McGrory v. ESB*[6] where it was ordered that the plaintiff's case be stayed until he consented to the defendant's medical advisers consulting with his own.

Interestingly, in my case, a number of the experts on either side of the case had a meeting in London about 18 months before the trial. All of the experts thought the case difficult, challenging, interesting and, to some degree, confusing. The London discussion obviously produced no overall agreement but it would have been very instructive to have been a fly on the wall on that occasion – a sort of dress rehearsal for the *hot tub*?

My final thought: if there is a difficulty in getting two or more world class experts to meet together at the same time in Dublin, I for one would be prepared to travel, and I suspect I could get hold of a willing registrar – especially to go somewhere sunny.

APPENDIX

FEDERAL COURT RULES

Order 34A - Evidence of expert witnesses

Application
1. This order does not apply to a question or matter to be tried before a jury.

Definitions
2. In this order:
expert witness means a person who is called, or is to be called, by a party to give opinion evidence, based on the person's specialised knowledge, based on the person's training, study or experience.
Evidence by expert witnesses
3 (1) This rule applies if 2 or more parties to a proceeding call, or intend to call, expert witnesses to give opinion evidence about the same, or a similar, question.

[6] Supreme Court, unreported, 24 July 2003.

(2) The Court or a Judge may, on its own initiative or at the request of a party, direct:

(a) that the expert witnesses confer; or
(b) that the expert witnesses produce for use by the Court a document identifying:

(i) the matters and issues about which their opinions are in agreement; and
(ii) the matters and issues about which their opinions differ; or

(c) that:

(i) the expert witnesses give evidence at trial after all or certain factual evidence relevant to the question has been led; and
(ii) each party intending to call 1 or more expert witnesses close that party's case in relation to the question, subject only to adducing the evidence of the expert witnesses later in the trial; or

(d) that, after all or certain factual evidence has been led, each expert witness file and serve an affidavit or statement indicating:

(i) whether the expert witness adheres to any opinion earlier given;
or
(ii) whether, in the light of factual evidence led at trial, the expert witness wishes to modify any opinion earlier given; or

(e) that:

(i) each expert witness be sworn one immediately after another; and

(ii) when giving evidence, an expert witness occupy a position in the courtroom (not necessarily in the witness box) that is appropriate to the giving of evidence; or

(f) that each expert witness give an oral exposition of his or her opinion, or opinions, on the question; or

(g) that each expert witness give his or her opinion about the opinion, or opinions, given by another expert witness; or

(h) that the expert witnesses be cross-examined in a certain manner or sequence; or

(i) that cross-examination, or re-examination, of the expert witnesses be conducted:

(i) by completing the cross-examination or re-examination of an expert witness before starting the cross-examination or re-examination of another; or

(ii) by putting to each expert witness, in turn, each question relevant to one subject or issue at a time, until the cross-examination or re-examination of all the witnesses is completed.

Further information on the 'hot tub' can found at www.austlii.edu.au (the Australasian Legal Information Institute) and www.alrc.gov.au (the Australian Law Reform Commission.