The Rules Committee

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9 September 2019
Access to Justice 05A/19

Circular 37A of 2019
Written Briefs of Evidence

Tēnā koutou,

Please find attached, for your consideration, a further memorandum on the question of written briefs of evidence supplementing C 37 of 2019 (C 37A of 2019).

This memorandum was previously circulated to the members of the Access to Justice Working Group on 15 August 2019.

Nāku iti noa, nā;

Sebastian Hartley
Clerk to the Committee

Memorandum

To: Access to Justice Working Group Members
CC: Rules Committee Chair
From: Clerk to the Rules Committee
Date: 15 August 2019
Re: Written Briefs of Evidence – Current English Initiatives

The Rules Committee

Introduction

1. Justice Venning has brought to the working group's attention, and asked me to further consider, initiatives in the business and property courts of England and Wales to review the practices around witness statements in that jurisdiction. These are being discussed in the Commercial Court Users Group, which is comprised of a half dozen judges and in-house counsel; representatives of solicitors' firms, barristers' chambers, and trade associations; and legal publishers.

2. As no report by the English working group considering these initiatives has yet been published, I have relied mainly on minutes of Users Group meetings in compiling this brief note on recent developments in England.

Context of the Initiative

3. Writing for the *New Law Journal*,[1] John Kimbell QC noted that the proposed reforms go to the "long-established reliance of the English courts on viva voce evidence at a public trial to prove factual allegations", which assumption has persisted despite the fact that, as a matter of practice, "in civil proceedings oral evidence has to a large extent been replaced by written witness statements exchanged months before the trial."

4. I have already set out the case against witness statements in my recent paper on the topic. Kimbell QC recites the familiar list of complaints against witness statements in contextualising the initiative:

> Lord Woolf's enquiry in 1995 heard evidence of the 'devasting effect' on costs of the use of witness statements. Lord Woolf was told that the small saving in costs achieved by avoiding oral examination in chief at trial was more than wiped out by the extra costs involved in preparing witness statements in the first place. In commercial cases, in particular, the practice quickly developed of investing many solicitor and counsel hours in crafting long witness statements following an extensive review of the disclosed documents. The statements would usually contain some direct evidence of matters known personally by the witness but this material would often be buried in many pages of scene setting, commentary on

[1] John Kimbell QC "The pen: mightier than the word?" *New Zealand Journal* (online ed, 8 November 2018).

documents, and in some cases, unveiled argument and an opinion on the issues in the case. In one case (*JD Wetherspoon v Harris* [2013] EWHC 1088 (Ch)), all but six paragraphs of a witness statement running to 231 paragraphs was struck out for abuse of process. The statement in question contained a long recitation of facts based on documents, commentary on these documents, submissions and expressions of opinion. Even if such extreme cases are rare, witness statements routinely bear little or no resemblance to what the witness would actually say if he or she were asked to give evidence in chief orally. It is not unknown for witness statements to be served in impeccable and highly sophisticated English by witnesses who speak little or no English. In his final report, published in 1996, Lord Woolf recommended that witness statements should not contain any comment on documents and should conclude with both a statement of truth and a statement that the statement is in the witness's own words. For reasons which are not clear, it was only the statement of truth requirement which was ultimately incorporated into the Civil Procedure Rules of 1999.

A decade later, Lord Justice Jackson's review of litigation costs recorded many of the same complaints about witness statements as had been expressed to Lord Woolf. Lord Justice Jackson proposed that consideration be given to adopting the German approach to witness evidence. In Germany, it is standard practice in civil proceedings to identify after each paragraph in a pleading whether the party intends to prove the fact alleged by a document or by oral evidence. If oral evidence is to be relied upon, it is necessary to identify the witness. This practice provides a clear structure for oral examination in chief and gives the other parties early notice of what witnesses will say without requiring the service of any witness statements.

5. Another interesting comment on the initiative comes from Mathew Rea, writing for *The Law Society Gazette*.[2] Complicating any notion that the simplest manner of responding to the problems of witness statements, and any similar concerns regarding affidavit evidence, is to afford greater weight to viva voce evidence, Rea observes:

> Judges are becoming increasingly critical of oral evidence and are finding ways to disregard it altogether, so they can base their factual findings on the (often extensive) documentary evidence instead. Lord Justice Leggatt has made detailed observations, based on scientific research (no doubt with the benefit of having a wife who is a consultant neurologist), about why even the evidence of truthful witnesses is 'fallible at best and unreliable at worst', simply because of the way memory works. Contrary to common perception, memories are not, he said, fixed mental records of events which gradually fade over time. Instead they are distilled meanings or impressions derived from (frequently flawed) perceptions of those events, which are then subjected to powerful biases when reconstructed for the litigation process.

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[2] Mathew Rea "A new approach to witness evidence" *The Law Society Gazette* (online ed, 19 November 2018).

> His view was that 'the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance on witnesses' recollections of what was said in meetings and conversations and to base factual findings on inferences drawn from the documentary evidence and known or probable facts'. These observations have since been endorsed by other judges in numerous cases, as well as by expert and academic psychologists.
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> In May Lord Neuberger went as far as saying: 'There is an argument for abandoning oral evidence, as they do in most civil systems in Europe.'
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> The Business and Property Courts has recently established the Witness Evidence Working Group, led by Mr Justice Popplewell, to review the current rules. […] Views have been sought on proposals to, among other things, abolish witness statements and return to oral examination-in-chief at trial, or abandon the process of witness evidence at trial altogether in favour of pre-trial US-style depositions. Could it be our venerable tradition of oral witness evidence is under threat?
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> It seems unlikely we would be prepared to abandon oral witness evidence at trial altogether. That could be a cultural step too far. The idea that judges benefit from seeing the witnesses in person to help bring their stories alive is something deeply embedded in our consciousness. There will always be cases where either there is no documentary record at all, or where the claim contradicts the documentary record, and the judge has no choice but to decide between directly conflicting oral evidence. Can the judge really expect to do so without seeing the witnesses in person? In such cases would the clients feel they had received a fair hearing without the opportunity to tell their stories in court?

The Initiative

6. The Judge has noted the following Herbert Smith Freehills litigation note from November 2018:

> A working group was set up earlier this year, led by Mr Justice Popplewell, to review the current rules and practice and make recommendations for potential reform of the procedures for factual witness evidence in the Business and Property Courts (the Chancery Division, Commercial Court and Technology and Construction Court). It has launched an online survey seeking views from court users on whether the current rules on witness statements ought to remain in their present form and be enforced more rigorously or whether the rules themselves need to be changed and, if so, how.
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> The alternatives set out in the survey include some radical alternatives such as: doing away with witness statements and returning to oral examination-in-chief; moving to pre-trial depositions; and (perhaps most controversially) lifting privilege in the production of witness statements so as to require a note be taken of oral

communications with the witness, with all communications and drafts to be disclosed to the other side, or permitting the opposing party to conduct or be present at the interviewing of witnesses.

7. The initial closing date for responses was 13 November 2018. This appears to have later been extended to 14 December 2018. As the survey is now closed, I have been unable to determine what was asked of survey participants. I have identified the contact details of a judicial staff member in England who may be able to provide further details.

8. Usefully however, firm Simmons & Simmons has provided commentary on the initiatives on its website. Kirsten Kitt and David Bridge report that issues the review is considering include:[3]

    - How to address the current length of witness statements, their careful construction by lawyers and their use as a vehicle for argument and submission - often very far removed from the requirement that a witness statement be in the witness's own words.
    - Should those who breach the existing rules as to length, avoidance of argument, unnecessary recitation of documents, irrelevance etc. be penalised in costs more frequently than is presently the case? Should there be a greater willingness to impose the existing sanctions upon those who have signed statements of truth in respect of witness statements which contain matters later proved to be untrue?
    - Is it right that witness statements continue to be relied upon as a witness's examination in chief, or should there be a return to oral examination in chief in some or all cases? If there were to be a return to oral examination in chief, should there be disclosure in advance of the gist of the evidence to be called (along the lines of the current witness summary process)?
    - Would the US deposition style method of taking evidence in advance of trial work for the English system? The transcript and or use of a digital video record could then stand as evidence for trial.
    - Should privilege be lifted in the production of witness statements, with notes being taken of all oral communications and such communications and drafts being produced to the other side. Alternatively, should the opposing parties be allowed to be present at all witness interviews?
    - If the current form of witness statement is to be retained, should it be issues based, with the specific issues that the evidence should cover to be determined at a CMC?

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3 Kirsten Kitt and David Bridge "Disputes – What to look out for in 2019: Procedural reform" *Simmons & Simmons: elexica* (online ed, 9 January 2019).

Recent Developments

9. At the Users Group meeting of 4 December 2018, Waksman J circulated the results of the survey that had then been received (some ten days before the survey ultimately closed to responses):

    a. 810 responses had so far been submitted from individual responses, with it anticipated that representative views of, for example, law firms, would be taken at a later stage in the consultation process;

    b. a "broad spectrum of views" had been conveyed by survey respondents;

    c. 70% of respondents had said that witness statements are often too long;

    d. 73% thought they stray into making legal arguments;

    e. 30% said they are hard to follow;

    f. 67% said that witness statements often contain irrelevant material;

    g. 60% of respondents said that the rules are not being followed and 79% thought the existing rules should be more rigorously enforced;

    h. 37% agreed that witness statements should have to contain a statement that they are in the witness' own words, and 55% were in favour of including a statement as to how well the witness remembers the relevant events;

    i. 65% agreed that there should be some provision for oral examination-in-chief, though only 12% thought that evidence-in-chief should be the predominant form of evidence;

    j. 12% thought that oral evidence (in chief and cross-examination) should occur prior to trial;

    k. 24% favoured oral examination-in-chief with advance provision of the "gist" of the evidence;

    l. less than 7% favoured lifting privilege over discussions leading up to the drafting of witness statements and just 6% thought that opposing parties should be permitted to be present during witness' interviews with their legal representatives;

    m. 43% thought that judges should be allowed to take a flexible approach to witness statements with a menu of options for consideration at case management conferences (CMCs);

n. 38% favoured limiting witness statements to allegations unprovable by documentary evidence;

o. 45% thought that parties should be required to identify in their statements of case those allegations which they intend to prove by witness evidence;

p. 55% agreed that witness statements of fact should be confined to issues determined at the CMC; and

q. 15% of respondents favoured a move to a pre-trial "memorial" of the facts.

10. The following comments were made by those present:

> Males J said that judges would surely be willing to enforce the rules more strictly more harshly if that is indeed the view taken by Court users. Teare J noted that judges are often asked not to allow in certain evidence, though this can seem a draconian approach. A difficulty also arises as to the appropriate time to consider these matters.
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> It was noted that there can sometimes be very little consequence for a witness who deliberately lies (or deliberately fails to disclosure relevant information) beyond being disbelieved in the judgment. Teare J asked Mr Crosse whether judicial enforcement of disclosure orders had been a topic of discussion within the disclosure committee. Mr Crosse said that it had been, and that some examples of judicial strictness might encourage greater compliance. However, in the content of disclosure, he noted that there is a difficulty in trying to create a new practice based on (in some cases) much narrower disclosure than at present, whist at the same time increasing sanctions for non-compliance. Popplewell J noted that stricter enforcement can present challenges for judges and can require considerable judicial time at the pre-trial stage.

11. It was agreed that the results of the survey would be discussed at a subsequent meeting of the Users' Group. This occurred at the Group's 13 March 2018 meeting:

> Popplewell J reported that this topic was being raised because there was a fairly widespread feeling that in this area the tools we have at the moment are not doing the trick, and not even saving costs, let alone getting "best evidence". He pointed out that good evidence in chief is very compelling and often best evidence. It is felt to be unfair on good witnesses that all they can do is put in their statement, and then face cross examination; there is no opportunity for them to tell their story live. There is a limit to what being conscious of this problem can do. The result is that theatre can win. The question is what to do – a briefing paper circulated indicated some outline possibilities.[4]

[4] I have, again, regrettably been unable to locate that discussion paper. Again, the best approach may be a direct approach to the English judiciary.

> The meeting agreed that this is real problem and endorsed the creation of a working party to consider the problems and the possible solutions or improvements, such as the extent to which some limited examination in chief could be provided for, and the extent to which this can be addressed at the CMC stage or would require consideration at the PTR. The possibility of a menu option was floated.
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> The potential implications for the practice in arbitration was noted; in particular it was important to note that the idea was not to go backwards towards blanket oral examination in chief, which would involve longer hearings and potential increase and front loading of costs. The importance of keeping this well in mind when looking at potential changes was emphasised. Robin Knowles J noted that it was possible without reform for parties to put forward imaginative solutions at the CMC – eg live examination in chief re a key meeting. This would provide a way to see what the system was already capable of and to evaluate possible routes. The Admiralty Users Group noted the benefits of the practice in collision claims which involved defining issues and at the same time identifying which issues need oral evidence.

12. It was agreed to put together a working party with a suitable range of representatives of different interest groups to test and further develop suggestions. In particular, the possibility of putting a question on the appropriateness of examination in chief on the case management information schedule was mentioned.

13. It appears that the Users Group maintains a broadly similar quarterly meeting schedule to the Rules Committee. I have been unable to locate the minutes of any June meeting, though it appears that the Users Group, again like the Rules Committee, only publishes each meeting's minutes some months after the event.