Witness headaches

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Dr Chris Pamplin looks at what can happen if an expert witness is prevented from attending for bona fide reasons

It can be argued that in an adversarial justice system, natural justice demands that each party should have a fair and equal opportunity to test the witness evidence. But how far should this requirement be allowed to override more practical matters imposed on a busy and expensive court system? The court can order the attendance of a witness, but what if a witness is prevented from attending for bona fide reasons?

When an expert falls ill

Mr Justice Foskett pondered these matters in a High Court application in *Robshaw v United Lincolnshire Hospital NHS Trust* [2015] EWHC 923 (QB), [2015] All ER (D) 21 (Apr). The court considered an application to adjourn a clinical negligence trial based on the defendant's inability to cross-examine one of the claimant's expert witnesses who was ill.

The claimant in the case had sought to rely on the expert evidence of a consultant paediatric neurologist (Dr F). Since the commencement of proceedings, Dr F had developed a stress-related illness that prevented him from attending trial to give evidence. There were concerns that the nature of his illness might render him incapable of attending any court proceedings in the foreseeable future. Instead, it was proposed that Dr F's evidence be submitted in written form.

The defendant made an application for the trial to be adjourned on the ground that he would be seriously prejudiced if he was unable to cross-examine the expert.

Considering the application, Foskett J noted that a position had been reached where Dr F and the consultant paediatric neurologist instructed on behalf of the defendant had met and discussed matters. There was, he said, a very substantial document indicating the areas of agreement and disagreement. He further noted that whilst there had been a wide measure of consensus, a number of issues remained—life expectancy being one such area.

Acknowledging that the application was an unusual one, Foskett J seems to have concentrated on the extent to which the defendant might have been prejudiced by the inability to cross-examine the expert. He weighed this against the perceived disadvantage the claimant would also face.

Giving his judgment, he said: "At the end of the day, experts do not determine the outcome of cases: the court does that on the basis of the totality of the evidence given. Plainly, the evidence of paediatric neurologists in a case of this nature is important and it helps to guide the court in the direction of the right result. However, I am wholly unable to see how it can be said that the defendant is prejudiced by the inability to cross-examine [Dr F]. The claimant's advisers have considered very carefully whether they themselves ought to seek a postponement of the trial in order to obtain a replacement…but have elected not to do so…it seems to me, the position taken by the claimant's advisers is an entirely responsible one to adopt. What it does mean is that the claimant goes into this trial without the ability to call a live witness experienced in paediatric neurology and it goes without saying that will doubtless present some forensic and logistical difficulties from the claimant's side. But looking at the matter as objectively as I can, it places the claimant in greater difficulty than the defendant."

The judge pointed out that the defendant would have the advantage of being able to call as a live oral witness one of the most experienced consultant paediatric neurologists in the field. Consequently, weighing the balance of potential injustice, it did not seem to him that the balance weighed down against the defendant. That being so, he concluded that the defendant's application was without merit and that the trial could, in his view, proceed perfectly fairly.

When just saving time

This decision should be contrasted with that reached in *Homebase v ATS Rangasamy* [2015] EWHC 68 (QB) where the High Court allowed an appeal against a decision not to allow the cross-examination of expert witnesses at trial.

The judge at first instance sought to reduce the time estimate for trial from three to two days by removing the oral stage of expert evidence. On appeal, Mr Justice Knowles upheld the reduction of the time for trial, but considered that it could be achieved by different means.

The evidence related to one of the key issues in the case on which the experts differed. Allowing cross-examination would therefore enable the court to assess the experts' comparative reliability. Knowles J held that, instead of removing the essential stage of expert cross-examination, the parties should be required to agree a specific and detailed timetable that would enable the trial to be completed within two days. This would permit the court to control the length of trial by imposing those arrangements as firm time limits.

The judge also proposed that time could be saved using the concurrent evidence procedure (hot-tubbing). Although the circumstances of this case differed substantially from those in *Robshaw*, it illustrates that, while the court seeks to avoid delays and minimise the length of a trial, it acknowledges the continuing importance of oral expert evidence in some cases and the need for cross-examination.

The presumption that natural justice should allow all parties the ability to cross-examine an opponent's expert is not, then, an over-arching one. Furthermore, the courts are unlikely to adjourn or delay trials in situations where the disadvantage or difficulties are equal or comparable on both sides. However, whether the judge in *Robshaw* would have reached a similar decision on an application by the claimant for an adjournment to allow time for a fresh expert to be instructed is questionable, particularly if the application was made with the agreement of the defendant. NLJ

Dr Chris Pamplin is the editor of the UK Register of Expert Witnesses and can be contacted on *nlj@jspubs.com*. Website: *www.jspubs.com*