Expert witness availability & trial dates

Chris Pamplin serves up a master class on how to avoid diary clashes in & out of court

IN BRIEF

- The Civil Procedure Rules (CPR) 1998 place a duty on the parties to a case to assist the court in the listing of cases for trial, and this would include expert witness availability.

Fixing of trial dates has always been a difficult task. A court has to juggle with numerous variables to ensure that the date fixed complies with the need to deal with cases efficiently and promptly and without incurring unnecessary cost. It must also have regard to the availability of witnesses (including expert witnesses) and allow sufficient time for the parties to properly prepare and carry out any necessary pre-trial steps.

An expert's instructing solicitor should, of course, obtain from the expert a list of any unavailable dates. If the solicitor does not ask for these, the expert should be proactive in supplying them. It would also be prudent to offer the reasons for unavailability. Naturally, experts must notify instructing parties of such dates in good time and before the fixing of any hearing date at which the expert might be required to attend. Should there be any changes in the expert's schedule or circumstances, these, too, should be notified without delay.

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Lord Woolf sets out the ground rules

In *Simon Andrew Matthews v Tarmac Bricks & Tiles Ltd* [1999] *CPLR* 463, Lord Woolf MR heard an appeal from the order of a judge in a pre-trial review in the Plymouth County Court. In that case (a personal injury claim), there had been questions regarding the availability of expert witnesses. The judge at the pre-trial review had suggested 15 July as a trial date and had asked the defendant's legal representative whether that date would suit. The defendant was represented by very junior counsel and no one was in attendance from the defendant's solicitors. Counsel for the defendant replied that this date was inconvenient for the defendant's experts because they had supplied 12–16 July as unavailable dates. The judge, who was reluctant to lose the possible trial date if it could be avoided, asked for the experts' reasons for being unavailable. However, the junior barrister had not been instructed on this. What she did not know was that one expert would be out of the country on the suggested date and the other was engaged on another trial.

The judge asked counsel if she would like a short adjournment to find out the reason why the experts would be unavailable or whether she would prefer the matter to be listed for the date he had suggested. She told the judge that it might as well be listed for that date and it duly was. The defendant's solicitors later contacted the court and asked that the judge give permission for an appeal. The judge, who had no more information than had been available to him previously as to the reason for the experts' unavailability, refused permission and did not list the matter for hearing. The defendant then applied to the Court of Appeal for permission to appeal.

The central issue was the proper approach to be adopted by the parties under the CPR to assist the court to list cases for trial. Lord Woolf made it clear in his judgment that the CPR had signalled a fundamental change in how the courts would deal with such matters. It was no longer sufficient to simply supply the court with a list of an expert witness's unavailable dates.

Reasons for unavailability must be given

Under the new regime of the CPR, it was essential that parties cooperated with each other and the court at every stage. Cases had to be fixed for hearing as early as possible if parties wished them to be heard in accordance with their convenient dates. Where agreement was not achieved between the parties, it would fall to the court to fix a hearing date. It was incumbent on the parties to ensure that all relevant material, including the reason(s) for the unavailability of witnesses on particular dates, was made available to the court.

Any suggestion that all the court required was to be told the dates that were inconvenient for the experts and it would thereupon find a date to suit was no longer valid (if, indeed, it ever had been). This approach, said Lord Woolf, caused inordinate delay and was inconsistent with the due administration of justice. He added that expert medical doctors who held

themselves out as practising in the medico-legal field had to be prepared, so far as was practical, to arrange their diaries to meet the commitments of the court. Where court hearings conflicted, real efforts should be made to see whether the time for the expert to give evidence in one court could be made to fit with the other court. Where holiday dates were jeopardised, efforts should be made to see whether holiday dates could be changed. In this case, the defendant had attempted none of the options.

Refusing permission to appeal, Lord Woolf said that the defendant in this case had totally failed to recognise the spirit behind CPR Part 1... that the parties should help the court to further the overriding objective. The defendant's problems were entirely attributable to its delay in seeking to fix a date and then failing to place before the court the full facts. Lawyers for the parties had always to be in a position to give the reasons why certain dates were not convenient to the experts.

This case made it abundantly clear that a party must take all practical steps to make their witnesses, including expert medical doctors, available for the trial date. If there were unavoidable difficulties, then the party must make the full reasons and information available to the court or risk the matter being listed in any event.

The court must, however, balance the requirements of the court procedural rules with the need to ensure a fair trial and the old legal doctrine of equality of arms. In *Matthews*, Lord Woolf did not specifically address this but did say that it would be for

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the trial judge to ensure that the defendant would not be prejudiced if either of his experts was unable to attend and no other expert appeared in their place.

Helpful finesse of the rules

Matthews can be contrasted with the recent decision in *R (on the application of Yogesh Parashar) (Claimant) v Sunderland Magistrates' Court (Defendant) & Crown Prosecution Service (Interested Party)* [2019] EWHC 514 (Admin). The case was a judicial review of the decision of a magistrates' court to refuse an application to vacate a trial that had been fixed for a date on which an expert witness could not attend. Although there are some differences in how trial dates are fixed in the civil and criminal jurisdictions there are, nevertheless, common factors to be considered when dealing with the availability of expert witnesses to attend trial.

Here are the facts. The defendant applicant had crashed his car into a parked vehicle in February 2018. A subsequent breath test showed that he was more than three times over the legal alcohol limit. He was charged with the offence of driving with excess alcohol and released on bail. He pleaded not guilty, and in May 2018 (in good time) an expert report was served on the prosecution. The trial was set for June 2018. However, the prosecution had been less prompt than the defendant and had failed to serve all its evidence and the trial was re-listed for 9 November 2018. The defence informed the court that the new trial date was unsuitable for the defendant's expert because he was already engaged to attend another trial on that date. Accordingly, they applied on 10 October to vacate the trial date, asking for an oral hearing of that application. The court refused the application on paper. It stated that there had already been delay and that the expert report could be admitted as hearsay. On 11 October, the prosecution served a report of its own expert, who was available to attend the 9 November trial date.

The defendant applied for judicial review of the magistrates' court's refusal to vacate. The application was unusual because, generally, the High Court will not entertain an interlocutory challenge to proceedings in the magistrates' court, unless there is a powerful reason for doing so. An application for judicial review might in principle be an appropriate means by which to challenge a decision of a magistrates' court as to an adjournment, though only in exceptional circumstances. Lord Justice Bean identified that such exceptional circumstances might include situations where:

- it was properly arguable that the ability of the defendant to present his defence was so seriously compromised by the decision under challenge that an unfair trial was inevitable;
- an important point of principle was raised, likely to affect other cases; or
- the case had some other exceptional feature that justified the intervention of the High Court.

Bean LJ recognised that it could only be in rare cases that the High Court would consider an interlocutory challenge once the trial was under way. The decision under scrutiny was not a refusal to grant an adjournment but a refusal to vacate a trial date, and he considered that the threshold of exceptionality was less high in such a case.

Dealing with the substance of the application, Bean LJ ruled that the magistrates' court's decision was unsustainable. If the trial had proceeded on the date fixed by the magistrates, the court would have had to decide between the evidence of two experts, one of whom was present and one of whom was not. It would have been particularly unfair when the date suited the prosecution expert, whose report had been served five months later than the defence expert. The defence, in this case, was not at fault at all. Indeed, it was the prosecution that had caused the difficulty by instructing an expert very late in the day and after having raised no objection to the defence expert's report being admitted. The prosecution should have either supported the defence application for the trial to be on a date on which both experts could attend, or indicated that it would not pursue the application to adduce its own expert's evidence. The decision to fix a date for a trial at which the prosecution expert could attend and the defence expert, whose report had been served in good time, could not, was clearly wrong. If the trial had proceeded on that basis, the trial would have been unfair. This, said the court, was an exceptional case where the High Court was justified in intervening by way of judicial review at the pre-trial stage. The defendant's application was granted and the hearing date was vacated.

The essential difference in these two cases is as follows.

- In the first, the appellant had failed to notify the court of any good reason for the expert's unavailability and had otherwise acted in a way that did not comply with the parties' duty to assist the court.
- In the second case, the applicant had acted promptly and properly in informing the court of good reason why its expert could not attend on the proposed date, had filed the expert's report in good time and was not at fault in any other performance of its duty.

Conclusion

It is likely that any expert witnesses who directs the attention of instructing solicitors to *R v Sunderland Magistrates' Court* in similar circumstances will not only have an easier time managing their diary, but will also have enhanced their reputation with the solicitors concerned. **NLJ**

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