Achieving best evidence in the civil courts

Richard Samuel considers whether a power to hear pre-recorded direct evidence would help judges maintain high standards of justice

IN BRIEF

- Where civil judges consider it to be important to hear evidence-in-chief from a witnesses orally, they do so in court.
- Our criminal courts have developed 'ABE' learning which has resulted in pre-recorded evidence standing as evidence-in-chief.
- A small amendment to CPR 32 could give civil judges the option to view pre-recorded evidence-in-chief as part of their reading-in for trial when appropriate.

In some cases, oral evidence is more important than in others. In those cases, it is often the oral evidence of just one or two witnesses that really counts. In contract cases those witnesses will be the people who attended the meeting at which an agreement is said to have been concluded, but of which there is no written record. In tort cases it will be the child who witnessed the accident. In both a criminal case and a civil case brought in tort, it will be the evidence of a student who says she was sexually assaulted on a date in freshers' week.

What tools do our civil judges have to deal with such cases? How do they employ them? CPR 32.4 requires that witness evidence for trial trials is set out for the court in a written witness statement. Indeed CPR 32.10 ordinarily makes a witness statement a pre-condition to a witness giving evidence and, under CPR 32.5(2), it will normally stand as his or her evidence in chief. After a couple of questions in chief from counsel 'settling' a witness, she is turned over to opposing counsel for the ordeal of cross-examination. The standard approach in CPR 32 serves the overriding objective the civil courts have set for themselves at CPR 1.1, primarily because it allows the other side to know the evidence brought against them and it saves court time at trial.

But our judges know that, in cases where oral evidence will be determinative, it can help them arrive at a fair decision to hear the evidence of a particular witness in chief, direct from her own mouth in court. Therefore at trial—despite the presence of a witness statement—they invoke the exemption within CPR 32.5(2); they adopt the traditional method of taking oral evidence in chief so they can see and hear the witness can give the critical direct evidence live. It takes a little longer, but in such cases judges consider that the additional court time and its associated cost is more than outweighed by the corresponding benefit: the improved quality of evidence on which to found the court's decision. Thus, where the circumstances of the case demand it, the judges demote slightly the factors of speed and cost in favour of justice in order to best serve the overriding objective.

Plain sailing

So far this is all plain sailing. One might conclude that the judges have the tools they need in their toolbox and leave it at that. But are there additional tools we could be giving them to help them maintain the highest standards of justice more readily? It has been the great strength of the civil courts of England and Wales in recent years that they have been vigilant to find and exploit opportunities to improve the service they offer: whether it be Lord Justice Jackson's costs reforms, Lady Justice Gloster's disclosure reforms, or Lord Briggs's structure review. These projects have often been driven by technology and have always been aimed at improving the balance between speed and cost as against quality of justice, so that our civil courts retain their pre-eminent position as an international centre for dispute resolution.

Our criminal courts have also been busy innovating. But they have been driven by a different policy objective: the need to achieve best evidence (ABE) before juries in cases that might not otherwise get to trial, let alone to verdict. Over the last 20 years, the profession has developed a great body of learning which has as its goal the capture and retention of the best evidence in cases involving vulnerable and intimidated witnesses. The techniques that have been rolled out across the criminal justice system since then include the video recording of direct evidence (an ABE interview) which is then played to the jury as the core of her evidence in chief. Cross-examination is now routinely controlled by the judge, conducted live via video link, or pre-recorded and played to juries at trial. The policy objective is always to achieve the best possible to enable the best possible justice—or in the vernacular: ABE. Can our civil courts derive any benefit from the investment the criminal side of the profession has made in this learning on best evidence? Or indeed, are there lessons to be learned from abroad?

Best evidence

This author's attention was drawn to the subject of best evidence in civil cases when he heard Laurence Shore—a doughty advocate in the international arbitration community, a US qualified lawyer, and now a partner at Bonelli Erede Pappalardo in Milan—clear his throat with weary resolution at a symposium in Frankfurt earlier this year. He was reviving an argument which he had been advancing with that sector for a decade ('Do Witness Statements Matter—And If So, How Can They Be Improved?', Laurence Shore in *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series No 18, at p302 (Kluwer, 2015)) His suggestion was that direct evidence should be pre-recorded on video and served in place of witness statements so that the arbitrators could assess the witness's evidence with the minimum possible mediation by lawyers. He argued that, where oral evidence was important, it would allow arbitrators to come to better decisions. In what has become our vernacular, he was basically arguing for ABE interviews in commercial cases.

On that occasion in Frankfurt his entreaty fell on deaf ears yet again. My impression was that he had been tilling arid ground among international arbitrators because their idea of best evidence is the documents. In that world it is not much of an exaggeration to say oral evidence is considered a self-indulgent, Anglo-Saxon idiosyncrasy that gets in the way of the real work of analysing the papers. But as the only barrister in the room, Mr Shore's suggestion had an immediate appeal to me. I had not heard the ABE argument advanced in the commercial disputes environment, in which witness statements uniformly stand as evidence in chief.

On questioning, Mr Shore explained that he envisaged that an arbitrator could order that direct evidence could be given in video-recorded form, with counsel asking questions and the witness answering in the normal way. The arbitrators would then view the video before the hearing instead of reading the witness statements. No additional hearing time would be required; after a few questions

'settling' the witness, opposing counsel would proceed directly to cross-examination in the normal way.

It struck me that the video might need to be accompanied by a transcript to enable cross-examination, and it might benefit from a witness summary with references to passages of the transcript and the time stamp on the video to help the arbitrator navigate the witness's evidence (my thanks to Alex dos Santos of Serjeants' Inn for this suggestion and his advice on criminal ABE). One would need to develop protocols or ethical guidance around recording practice, but its essential elements are immediately clear: the video would start and run continuously in a single take (barring adjournments) until it stopped, as it would do if conducted at a live evidential hearing. An agreed bundle of documents would be required for the witness. But details such as these can be worked out. The real question is: could an ABE approach improve civil justice for particular witnesses in appropriate cases simply and inexpensively?

ABE approach

It seems to this author that the time for video recording of direct evidence may have come because technology has made it very cheap and easy to record, transfer and view evidence in this form. The technology is also now also much more uniform and stable; it is much less likely today that a technical glitch will upend proceedings. In short, a judge can be confident that, if he or she thinks it important, he or she can get the best quality direct evidence in video form before trial, without having to incur the extra time and cost of hearing direct evidence live at trial.

This author suggested to Mr Shore that the English civil justice system might be more fertile ground in which to plant his idea. The English courts do value oral evidence and the English Bar has the skills to deliver it to the court effectively. Indeed, it seems to this author that, with nothing more than a small amendment to CPR 32.4 and 5 accompanied by a suitable Practice Direction, we could to introduce an additional tool into the English civil courts' toolbox for achieving best evidence: the option to order that specific witnesses serve direct evidence by video-recording.

Comment

The profession is fully aware that its system, like any justice system in the world, is forced to make compromises as to cost, speed and justice. The great strength of our system is that it regularly recognises when those compromises can usefully be revisited. So it is that the broad trend over the last few years is to move away from the old 'one-size-fits-all' model—be it detailed assessment of adverse costs after judgment, standard disclosure or paper trials. And yet, at present the civil courts still have a one-size-fits-all approach to witness statements. Now may be the moment to consider whether provision should be made in the CPR for a variable approach to direct evidence.

In most cases witness statements are the right compromise between cost and justice. But we all know this compromise can result in evidence which is 'lawyered' endlessly to eliminate compromising material so far as our ethical rules will allow—and sometimes beyond. That is why judges choose traditional methods of taking direct evidence when they think it is important to do so. Technology has developed to the point that we can make it much easier and less expensive for judges to 'ABE' where they think it is desirable to do so. We should give them the benefit of that technology so they can continue to receive best evidence and deliver the best possible justice. NLJ

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