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Hot Tubbing Experts

by Jess C. Bush

Recently, I settled a multi-party, multi-action motor vehicle accident claim at the third pre-trial, which occurred on the eve of trial.

At the second pre-trial, some months earlier, the court had ordered a "hot tub" involving the four liability engineers.

Rule 20.05(2)(k) of the *Rules of Civil Procedure* provides that, where a summary judgment has been refused, or granted only in part, the court may give directions, including that any experts meet, on a without prejudice basis, to identify the issues on which the experts agree and disagree, to attempt to clarify and resolve any issues and to prepare a joint statement, setting out the areas of agreement and disagreement and the reasons for it. The court may order such a meeting if, in the opinion of the court, the benefits that may be achieved are proportionate to the amounts involved or the importance of the issues involved in the case and there is a reasonable prospect for agreement upon some or all of the issues or the rationale for opposing expert opinions is unknown and clarification would assist.

By virtue of Rule 50.07, if a proceeding is not settled at a pre-trial, the presiding judge may make such order, as the judge considers advisable with respect to the conduct of the proceeding, including a meeting of the type just described of experts.

Pre-trial judges are now ordering (or suggesting) these meetings or "hot tubs" on a more frequent basis. My experience involved engineers but it could easily have involved damages experts in another setting. In particular, often times, there are huge differences between future care cost experts and that could, as well, be the subject matter of one of these meetings.

With this background, I offer the following comments.

These meetings are only to be ordered when they make sense on the basis of proportionality. The fact is that such meetings are expensive as, in the case that I was involved in, the four experts met for the entire day and subsequent exchanges between them occurred before they were able to issue a joint statement. Clients involved in smaller claims may not wish to go down this road and counsel should be prepared to voice that concern when the pre-trial judge raises the idea of a "hot tub."

The issue of expense is, of course, increased if counsel are to be involved in the meeting. In our case, counsel allowed the engineers to meet alone, although things may have occurred differently with different experts.

As mentioned, these meetings, and the product of these meetings, are without prejudice. However, the reality here is that agreements achieved, or gaps in opinions that are identified, will have real world results. An expert who has agreed to a point in a "hot tub" setting as being correct is unlikely to take a different position when in the witness box.

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Jess makes frequent appearances at both the appellate and trial levels of the Ontario courts. He also sits on the boards of directors, audit committees and conduct review committees of a Canadian property and casualty insurance company and of two Canadian life insurance companies.

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In every case, counsel should meet and brief their expert as they would for trial.

As you can appreciate, the skill set required of an expert for this task may be different than the skill set required to review evidence and prepare an opinion, present that opinion at trial and be subject to cross-examination. In a "hot tub" setting, the expert will require not only a grasp of the underlying substance but, as well, a strong personality, people skills and even negotiation skills. Not every expert will be well suited to this process.

In my recent experience, certain gaps in the opinions of the opposing engineers were identified during this process. I feared that the "hot tubbing" process would simply allow the opposing experts to back-fill their opinions to somehow fill those gaps by delivering supplementary opinions. That occurred to some extent but, in the end, I believe that the gaps identified during this process allowed the claims to settle. So it was worthwhile.

Choosing an expert is an important task in the life of a lawsuit. Not every expert is a professional witness. Now counsel should bear in mind that their expert, whether a liability expert or a damages expert, may be required to participate in a meeting of experts following the pre-trial and before trial. The skill set required to succeed in that arena should be considered when experts are being retained.

Counsel, with their client's input, should be prepared, at the pretrial, to address the issue of whether a hot tub makes economic sense in their particular case if the pretrial judge raises the question. ■