

Witness evidence and refreshing memory: virtue or vice?

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New requirements for the preparation of [witness evidence](#) in the [Business and Property Courts](#) (B&PCs) have been introduced in the form of Practice Direction (PD) 57AC and Appendix, and apply to all trial witness statements signed on or after 6 April 2021.

A key feature of the new regime is the requirement, at paragraph 3.2 of PD 57AC, for the witness statement to list all documents the witness has referred to, or been referred to, for the purpose of providing the evidence set out in the statement. It's fair to say that this is also the most controversial feature of the new regime, being the one point to split the Witness Evidence Working Group (and its implementation sub-committee, of which I was a member).

The aim of this new requirement is transparency. As the Working Group's implementation [report](#) put it, it is seen as desirable for the court to know up front "the extent to which what is presented as factual witness testimony in chief has been or may have been stimulated or influenced by going through the documents in the case", including documents the witness saw at the time of the relevant events, and those they did not.

An entirely new transparency

It is worth noting at the outset that the ability for the court to "see behind the veil" as to the documents the witness has reviewed in the course of preparing their evidence is entirely new. Many other aspects of the new PD and Appendix essentially aim to replicate the situation that existed in the days before witness statements, when the witness would have given their evidence orally in court. So, for example, the witness giving evidence in chief could not be asked leading questions, and their evidence could not be used as a vehicle to argue the case by reference to the documents. The new provisions restricting the use of leading questions in witness interviews, and prohibiting the practice of using the statement to set out a narrative based on the documents, mean that the witness's statement (which stands as their evidence in chief) should

more closely resemble the evidence the witness would have given orally.

It might be thought that the requirement to list documents the witness has reviewed for the purpose of preparing their statement is similar, since there were tight restrictions on a witness's ability to refresh their memory from documents while giving oral evidence in chief, and it would be obvious to the judge if the witness did so. However, of course, that was only part of the picture: the judge would have had no idea what documents the witness had reviewed before entering the witness box to be sworn in, unless that was brought out in cross-examination. The new requirement to list documents reviewed by the witness therefore results in greater transparency, in this regard, than there would have been before witness statements were introduced. That does not mean it is a bad thing, but it makes it more important to consider why it was thought to be needed and what risks it might present.

Raw memory vs. refreshed memory

The view or assumption which seems to underpin the requirement is that a witness's "cold" recollection is likely to be the most reliable. It is I think uncontroversial that there is a risk that a witness's memory might be influenced, or altered, by repeatedly revisiting relevant events. And so the process of interviewing the witness, and showing them documents, must be handled carefully. To the extent that the provisions of the new PD and Appendix reinforce that caution, they are to be welcomed. But is raw memory necessarily best?

In my view, that question depends very much on what an individual is being asked to remember and in what circumstances. If I have recently witnessed a road traffic accident, it seems obvious that my recollection will be more valuable if it is given spontaneously, without the risk of being influenced by the accounts of other observers or any documentary or other evidence relating to the

crash. But if the question is where I went for dinner on the first night of a summer holiday five years ago, it seems equally obvious that I'm more likely to give an accurate response if I'm shown photos of my activities earlier in the day, to put me back in the relevant context, than if I'm asked to search my memory banks without such assistance. Left to my bare recollection I may not remember where I went that summer, much less what restaurant I ate in.

The same is true, I would suggest, if a witness is asked to recall a meeting they attended five years ago, particularly one at which complex matters were discussed in great detail, as is not uncommon in the world of commercial transactions which tend to form the subject matter of litigation in the B&PCs. If asked for their bare recollection as to what was said at the meeting, the witness may have little or nothing to say. But if they are able to review the emails they sent and received in the day or week leading up to the meeting, which give the background to the transaction and the issues they were dealing with at the time, it may be that they are able to recall the discussion in much greater detail.

That may be met with the criticism that the product of this process is reconstruction rather than recollection, but I don't think that necessarily follows, or in any event that the witness's evidence is less valuable, or less weight should be given to it, as a result. Particularly since, as the working group's implementation report recognises, the important parts of a witness's evidence will be what isn't covered by the documents, or at least isn't clear from the documents. So, in most cases the witness is not "cheating" by reviewing the documents, or somehow getting the answers from them. The point of reviewing the documents is to remind the witness of surrounding circumstances so that they are better able to recall matters which are not revealed by the documents. Such recollections cannot be derived from the documents and, I would say, are likely to be more, rather than less, accurate than the witness's cold recollection some years after the relevant events.

Of course it may be different if the witness is shown not just the emails they sent and received leading up to the meeting, but a note of the meeting prepared by another attendee which gives their subjective, and potentially controversial, account of how the discussion unfolded. It's clear that this sort of document might influence the witness's recollection in an undesirable way. And, to be fair, it is this sort of practice that the PD and Appendix particularly seek to avoid, emphasising that "particular caution" should be exercised in

showing a witness documents they did not see at the time. But the requirement for a list is not limited to this sort of document, and it seems to me it raises potential concerns.

The risk of adverse inferences

To my mind, the most significant downside of the new requirement is the risk that a judge might draw adverse inferences as to the value or reliability of a witness's evidence where there is a long list of documents reviewed, when, in most cases, the vast majority will be documents the witness saw at the time and there will be no reason to think that the witness's recollection has been altered or influenced in a problematic way.

As the reforms bed down and it becomes clear how the courts are approaching this, it may be that this concern subsides. So, for example, in the recent decision in *Global Display Solutions Ltd v NCR Financial Solutions Group Ltd*, the Commercial Court has taken what I consider to be a sensible and pragmatic approach to the desirability of witnesses reviewing contemporaneous documents. In that case, Jacobs J rejected a party's witness evidence on a key issue, commenting that the fact the witnesses did not refresh their memories from contemporaneous documents meant their evidence was "far less likely to be reliable than it might otherwise have been". Although the new PD and Appendix did not apply, since the statements were signed before 6 April, it is clear that the judge did not think the new requirements would affect his decision. He commented that the new rules contemplate that witnesses will be shown contemporaneous documents, particularly those they had seen at the time of the relevant events.

If that is the approach applied by most judges, then it may be that there is little to fear from the new requirement. Adverse inferences will, it is hoped, be reserved for cases where it is clear a witness has been shown material they did not see at the time, with a view to planting suggestions in their mind and persuading them to give evidence supporting a party's case on key issues, when that was not in fact their recollection of events. Though, if that is the case, it is difficult to see what the requirement to list all documents reviewed by the witness adds to the separate requirement under the PD and Appendix to identify whether (and if so when and how) a witness's recollection on important disputed matters of fact has been refreshed by reference to documents, and identify those documents. That was a requirement on which the working group was

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agreed, as it is more closely targeted at the evil it is intended to avoid.

What is clear is that parties to litigation, and those advising them, will need to think carefully about the documents a witness should be shown, in light of the new requirement to list them in the statement. The key question in any given case will be whether the process of refreshing the witness's memory by

reference to those documents will allow them to give more complete and ultimately more reliable evidence... and, crucially, whether the court is likely to concur with that assessment. Or whether there is a risk that the presence of a long list might lead the court to discount the witness's evidence on the basis that it is mere reconstruction, rather than recollection.

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