The heat is on

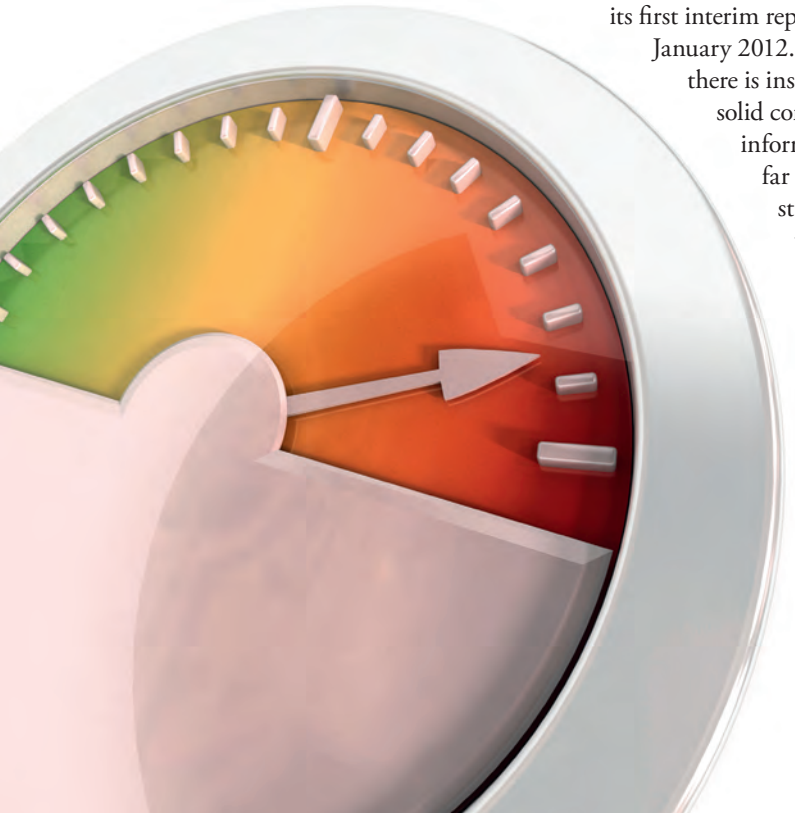
Chris Pamplin reports on some initial findings about expert evidence given concurrently from the "hot tub"

The great advantage claimed for the practice of "hot-tubbing", a procedure that allows experts to give their evidence concurrently and for judge-led "discussion" of the expert issues, is that it saves time. The expert issues that are agreed, and those that are not, are established quickly, and the examination and cross-examination of two or more experts can often be completed in the time it would otherwise take to deal with a single witness. It enables experts to give a direct and immediate view on the opposing evidence and to comment on points as they arise. The court can then consider all aspects of the expert evidence together and while matters are still fresh in the mind.

Time is money

The old adage "time is money" has never been truer than when applied to the English civil courts, and the relative expense of expert evidence in contested proceedings is a matter that has been uppermost in the minds of those charged with reforms to the justice system. In his final report (*Review of Civil Litigation Costs: Final Report 2010*), Lord Justice Jackson recommended that there should be a pilot scheme to assess the extent to which the "hot-tubbing" technique could be used successfully in the English civil courts. This recommendation was taken up by the judges at the Manchester Technology & Construction Court and Mercantile Court, who agreed to participate in a pilot study. The scheme had judges identifying those cases that might be suitable as pilot studies and inviting the parties to participate.

The pilot scheme is monitored by the UCL Judicial Institute, which evaluates the efficacy of the scheme using questionnaires to those judges, barristers, solicitors and expert witnesses who have taken part. Albeit with only a small sample of completed questionnaires to hand from the three cases that had completed passage through the pilot, the institute published its first interim report on the scheme in January 2012. It acknowledges that there is insufficient data to reach solid conclusions, but the information garnered thus far makes an interesting study and gives some useful pointers to how the procedure may develop and the extent to which it has been favoured by participants.



Pilot cases

The first pilot case concerned the fitness for purpose of motor vehicles supplied under a contract and involved expert evidence from engineers. After the case had concluded (in favour of the claimant), the legal representatives of the parties were positive in their assessment of the procedure. The consensus was that it was efficient and made it easier for the court to compare the evidence. The point was also made that it may have encouraged greater objectivity on the part of the experts. The claimant's solicitor mentioned, specifically, that the process had "reduced time and expense for the parties" and had allowed the judge to "take control of the evidence", although this was apparently with some reluctance on the part of counsel for both parties. Other participants, however, were less positive about the extent to which costs had been saved, and the majority believed that the procedure had been cost-neutral.

What, however, the participant disagreed about was the rigour of the process. Both the judge and the claimant's solicitor took the view that the procedure had given a more rigorous examination of the expert evidence than would have been the case in the conventional sequential evidence and cross-examination procedure. However, both barristers and the solicitor for the defendant took the opposing view. The judge thought that the case had run smoothly and there had been a large amount of reading and analysis before trial.

Only one of the experts responded to the questionnaire—and he only in part. However, it was clear from his comments that he was broadly happy with the procedure. The expert was a man of some considerable experience, who had been giving evidence in the conventional manner for more than 40 years. He did not identify any particular advantage of concurrent evidence over conventional evidence, but he did say that he found the procedure to be less adversarial and he felt it was easier to explain differences of view. He highlighted the main benefit as being that: "When the other expert said something with which I did not agree, I could immediately explain my disagreement direct to the judge, rather than have to explain it to my counsel and for him then to cross-examine the other expert."

It's good to talk

Pointing to the fact that technical points were not always grasped fully by counsel, the expert thought that the ability to talk direct to the judge was a "great improvement".

The second pilot case involved questions

of causation in damage to cargo in transit. The judge said that it had been considerably easier for the court to compare the evidence and the process had been more focused. He thought, though, that the procedure would best suit cases where the expert issues were fairly narrow.

The parties' representatives, too, were fairly positive, the majority feeling that the procedure had been more efficient, easier and more focused. Only one participant thought that there had been any significant saving in costs, although all felt that some trial time had been saved.

This second case brought a more substantive response from the experts. Both experts gave positive reactions, agreeing that the procedure had been more efficient, easier and more focused. One thought that there had been a more rigorous testing of the evidence and greater objectivity; although the other opined that this was no more than in conventional cases. As before, the one advantage highlighted by the experts was the ability to raise issues directly and to deal with disagreements quickly.

The third case followed the trend set by the first two. This case concerned a property dispute where the expert evidence involved the opinion of surveyors as to the precise location of a boundary. Of those who responded to the questionnaire, all agreed that the process was efficient and focused. Neither the judge nor the losing claimant's representatives thought that there had been any saving in costs. The judge thought that court time had been saved by as much as half, but pointed out that the costs to the parties had already been incurred.

According to the interim report there was a lamented lack of response from the experts, stating that neither returned the questionnaire. But that isn't the case. John Seed, chartered surveyor from the Brown Rural Partnership in Macclesfield is one of the expert witnesses in the *UK Register of Expert Witnesses*. He took part in the case and has told me that he did indeed return the questionnaire but, for whatever reason, his comments didn't get through to the interim report.

Expert response

In his response he said that the hot tub did save time and therefore cost, and had the following observations about the process:

- The judge's identification of the relevant issues for discussion could be critical, although the process does give scope for other issues to be raised by the experts and counsel.
- Counsel for the losing side indulged himself in conventional cross-examination, which is contrary to the spirit of the process and the draft guidelines for the pilot. Therefore, the role of the judge will be critical as referee in ensuring that all parties work to the spirit of the process.
- The process is very similar to an informal hearing for a planning appeal, where the planning inspector identifies what he or she considers to be the main issues, and leads a discussion on those points. There is always scope to widen the discussion.
- The concurrent evidence session lasted less than half the time that it would have taken with conventional back to back evidence.
- Both experts felt the process worked well, and allowed them to concentrate on the issues, and for the court to get a better understanding of those issues.
- The experts felt more in control of the evidence; being able to ask each other questions and raise points as they arose worked well.
- The experts were able to concentrate on examining the issues, rather than anticipating and dealing with counsels' techniques and tactics in cross examination.

The rigour with which the court can conduct its examination of the expert evidence remains a moot point. Some thought that the pilot scheme enabled a more rigorous examination of the evidence, while others thought that it was neither more nor less rigorous. However, only a small minority of respondents thought that it was less rigorous.

The interim report finds that there are "time and quality" benefits to be gained from the use of concurrent expert evidence, and that there is no evidence of significant disadvantages from the point of view of the judiciary, counsel, solicitors or experts. Acknowledging that more data is required, the report concludes that, in view of the positive evaluations received to date, and the willingness of parties to participate (as demonstrated by the number of cases that were signed up initially to the scheme but which settled before trial), it would be appropriate for concurrent evidence to be included in CPR Pt 35.

Conclusion

The biggest disappointment to the architects of the scheme will be the perceived effect on costs. While many thought that the procedure had resulted in savings of court time (in one case as much as half), the great majority did not believe that it had produced any significant saving of costs. But then, isn't it true to say that any procedure that comes into play in court is unlikely to exert a significant downward pressure on costs in the work that happens in the run up to trial?

> "It enables experts to give a direct and immediate view on the opposing evidence & to comment on points as they arise"

Analysis

Even though the interim report is based on a small sample of cases, patterns are already beginning to emerge. The great majority of the responses indicate that judges and most participants find that a system of concurrent evidence has a higher level of efficiency and focus. It encourages all involved to concentrate on issues prior to trial and to identify areas of disagreement. The ease with which conflicting evidence can be examined side by side was generally found to be helpful, as was the way in which the technique allowed the court to consider and dispose of the issues one by one, instead of having to return to them, often hours later, as happens with sequential evidence.

The standard adversarial methods for finding whether witnesses are telling the truth or not have never sat that well with opinion evidence—is an expert who honestly holds an errant opinion telling the truth? So even if the hot tub stands little chance of saving money, the better handling of opinion evidence ought to be reason enough to welcome its arrival to our shores.

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