Your Witness

Newsletter of the UK Register of Expert Witnesses, published by J S Publications

MoJ expert fees project

The response of the *UK Register of Expert Witnesses* to Part 3 of the Ministry of Justice (MoJ) Consultation Paper 18/09 – *Legal Aid: Funding Reforms* – issued on 20 August 2009 draws together 1,076 contributions from more than 660 expert witnesses listed in the *Register* (see *Your Witness* 58). Ultimately, we concluded that the MoJ had not identified the inflationary drivers on expert witness fees and had failed to produce cost-saving proposals that were sufficiently targeted, or neutral in terms of supply and competition, as to be capable of being broadly accepted by expert witnesses.

The nature of the proposals left little doubt that the driving force behind the consultation paper was financial. We concluded that if these budgetary factors force the MoJ to adopt the proposals, then quality, competition and supply would all be adversely affected and would reduce access to justice for the most vulnerable in Society.

After a 3-month hiatus, the MoJ finally reported back in early March 2010. In its *Response to Consultation*, the MoJ said:

> *'We received a good response to this consultation and we are pleased that so many knowledgeable respondents provided constructive input to our thinking. The majority of respondents were clearly against imposing either fixed fees or the suggested hourly rates on the basis of our current knowledge. There was a very strong message from all categories of professional expert witness that if inadequate remuneration rates are imposed, this would lead to more experienced practitioners refusing to undertake the work, potentially leading to access and quality problems across England and Wales.'*

Accordingly, the MoJ has decided that it will:

- carry out a data gathering exercise to increase its understanding of the type of work experts undertake and what rates are currently paid
- set up a working group, including expert witness representative bodies and other interested stakeholders, to help analyse and validate the findings of this exercise – and work towards establishing fixed fees and hourly rates, where appropriate.

Paper trail

The MoJ data gathering exercise will involve the Legal Services Commission (LSC) undertaking a file review over a 2-month period starting in May 2010. To ensure that the information it collects is as comprehensive and representative as possible, they need a good number of legal aid solicitor practitioners to send them recently closed case files that include invoices for expenditure on expert witnesses.

Whilst I am pleased that the MoJ seems to be listening to the concerns expressed by many over the proposed arbitrary cuts to expert fees in legally aided cases, and I have agreed to work with the MoJ on this project, experience has taught me to be cautious. We are, therefore, contemplating running a parallel data gathering exercise. If feasible, this would provide a valuable double check on the work the MoJ is undertaking.

If you undertake a reasonable amount of legal aid work and are willing to collaborate to build a detailed (anonymous) dataset on the fees actually paid in a sample of your recent cases, please e-mail me on *mojdata@jspubs.com* to register your interest.

Letterheads

The zeal with which the recently ejected Labour government made new law in its 13 years in power means that lots of people end up breaking the law without realising it. One example is the law relating to your letterhead (which derives mainly from the Companies Act 2006).

A sole trader (the business structure of choice for many expert witnesses) can trade under his own name or can choose a different business name. If not using his own name, he must include his name and the business address on all letterheads, invoices, etc.

For a partnership business all letterheads, order forms, receipts and invoices must include the names of all partners and the address of the main office, or if there are lots of partners it is acceptable to state where a list of partners may be found.

If trading as a limited company, the letterhead must include:

- full registered company name
- company registration number
- place of registration
- company registered address, and
- the address of its place of business, if different.

There is no need to include the names of the directors on the letterhead for a limited company, but, if included, *all* directors must be named.

These requirements apply equally to printed stationery and electronic versions. Also, invoices and receipts should include the VAT registration number, if registered. Finally, if you have a web site, the same rules apply. So, don't get caught out for the sake of doing a quick check that your stationery and web site are compliant.

Chris Pamplin

Inside

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Getting into hot water

'Hot tubbing' of experts began in Australia...

In previous issues of *Your Witness* we have reported on what we referred to as the parlous state of the law relating to expert witnesses in Australia. Australian experts were reported to be charging up to $10,000 a day to give evidence, and some were openly advertising their services on a no-win, no-fee basis!

A survey of judges[1] revealed that more than one-quarter had encountered severe cases of bias and one-third ranked bias and the lack of objectivity by experts as the single most serious problem with expert evidence.

The Australian courts looked at various ways in which this problem might be overcome, and one of their more controversial experiments was with the practice of 'hot tubbing' – a procedure where groups of experts are sworn in together and are then questioned and allowed to attack and criticise each other's reports. There have been fairly mixed results and it is still the subject of vigorous debate amongst Australian practitioners and judges.

The news that Jackson LJ is now looking at running a trial of the practice of giving concurrent evidence (CE) in the English and Welsh courts is, therefore, something of a surprise. CE is the 'official', and somewhat more sober, branding given to hot-tubbing. Jackson has decided that a pilot study should be undertaken to see if the process is viable. He regards this as something that might help to reduce court time and costs. He also thinks that, subject to the agreement of the parties, the experts and the judge, this is a practical approach that might be applied to some advantage.

Australian experience

It is, therefore, worth revisiting the Australian view and assessing the advantages and disadvantages of the system as revealed in practice.

The criticism of expert evidence by Australian judges led to calls for single experts appointed by the court. Some Australian courts, such as the Land and Environment Court and the Queensland Supreme Court, had already taken steps towards reform and had introduced a requirement that evidence be given by a single expert witness approved by the court. It was reported that these measures had drastically reduced costs and halved the length of cases. However, it was recognised that there were risks in choosing a single expert to opine on how a major controversy within a discipline should be resolved. In cases where there was disagreement within the scientific community, it was difficult to select a single expert who still held an open mind. In such cases, no impropriety was necessarily alleged; it was merely that any given expert may have simply moved to a concluded opinion before others. He might be right, but he might, equally, be wrong. Consequently, it was thought that the danger was best avoided in such cases by appointing panels of two or three experts who could give their evidence together and would thus be able to debate the more contentious points in the evidence.

... and quickly moved to the mainstream

This was the beginning of the concept of CE. From here, it was only a short step to the idea that experts appointed by the parties should present their views at the same time, in contrast to the conventional approach where an interval of several weeks might separate the experts's testimonies.

It was said that the panel approach enabled the judge to compare and consider the competing opinions on a fairer basis. In addition, the court found that many experts preferred the procedure and welcomed it as a better way of informing the court. There was also a symbolic and practical importance in distancing experts from the party that called them and thus reducing the risk of partisan evidence[2].

Early successes led to wider adoption

The CE experiment has been employed in some Australian courts and jurisdictions, but by no means all. And there are distinct differences in its admissibility in the various state courts and tribunals. The Federal Court Rules were amended in 1998 to facilitate the use of CE. The intention was to enable the experts in the case to debate contentious points, particularly in 'cutting edge' science, and to do this in such a way that judges and counsel were able to follow the arguments.

It has been reported that the experience of the Federal Court was that the CE procedure narrowed the issues in dispute. It was also felt to be advantageous for all of the expert evidence to be presented together so that it would remain fresh in the mind of the decision maker.

The procedure was generally regarded as effective in reducing the level of partisanship of experts and was also thought to be a more economic use of court time than the conventional approach. It is important to note, however, that CE was intended initially only for debating and testing the expert evidence in really big issues where there were considerable differences between leading experts in difficult or emerging areas of science.

How it works

The relative success of the experiment led Australian reformers to the belief that CE might be extended to more run-of-the-mill cases. In 2004, the Administrative Appeals Tribunal (AAT) of New South Wales launched a study to assess the merits of CE. It considered the types of tribunal case in which the procedure was being used and those to which the procedure might be extended. And it sought to determine the criteria by which suitable cases would be selected.

The procedure for expert witnesses giving CE differs in the various courts and jurisdictions in

which it has been tried, but it is summarised by the AAT as follows:

Prior to Hearing

- Prior to a callover (a type of pre-trial review or directions hearing), parties are requested to confer with each other and to submit hearing certificates listing the dates on which all expert witnesses are available to give evidence concurrently.
- Parties are expected to come to a callover with the dates when their experts are available to give evidence concurrently.
- After a callover, members select cases that are suitable for CE, based on the above criteria. Members then complete a 'selection sheet' that provides data as to why a case was, or was not, selected for CE.
- The member's support staff then notify the parties that the case has been selected for CE and a CE pamphlet is sent to those parties.
- Parties's representatives are asked to notify the expert witnesses of the CE procedures, and they are encouraged to give the experts a copy of the CE pamphlet.
- Parties are requested to exchange expert written reports prior to the hearing. The parties's Statements of Facts and Contentions are sufficient to identify agreed facts, and therefore no extra statement of agreed facts is required to be filed and served.

On the Day

- Expert witnesses should arrive in time to confer before evidence is taken.
- The Tribunal welcomes and swears the expert witnesses.
- At the outset of the expert evidence, the Tribunal summarises orally, or in writing, the agreed and disagreed facts.
- The applicant's expert witness gives a brief oral exposition.
- The respondent's expert witness then gives a brief oral exposition.
- Alternatively, the Tribunal may proceed to ask questions of the expert witnesses.
- The respondent's expert is invited to ask the applicant's expert witness questions, without the intervention of counsel.
- The process is then reversed, so that a brief colloquium takes place.
- Each expert witness is invited to give a brief summary, including views on what the other expert has said and identifying areas of agreement and disagreement.
- The parties's representatives may then ask any relevant or unanswered questions of the expert witnesses.
- At any appropriate time in the process the Tribunal may intervene and ask questions.

Why litigants choose, or reject, CE

In the course of its investigation, the AAT found that common reasons for electing CE were that the experts would be commenting on the same issues, and that CE would clarify these issues and improve the objectivity of the evidence. It found that the majority of those choosing *not* to elect CE did so for reasons that included:

- the experts might not have the same level of expertise
- the experts might not be commenting on the same issues
- the experts might not have the same area of expertise or have different specialities within a broader area of expertise
- CE could unduly increase costs
- CE could extend hearing time, and
- the experts might not be available to give evidence concurrently.

Some respondents objected to CE as a matter of principle, while others thought that it was an unequal process because one expert might dominate, thereby giving his opinion additional weight that was not merited. Difficulties were also highlighted in cases where there were a large number of experts in the same or differing disciplines.

CE influences pre-trial behaviour

CE moved into the mainstream

The Committee appointed by the AAT reported in November 2005. On the whole, it was favourably impressed by the procedure and found that it moved away from lawyers interrogating experts towards a structured professional discussion between peers in the relevant field. The experience in the Land and Environment Court, it said, indicated that:

> *'... the nature of the evidence is affected by this feature, and that experts typically make more concessions, and state matters more frankly and reasonably, than they might have done under the traditional type of cross-examination'.*

The Committee's findings in relation to the efficiency of the procedure were more mixed. While some cases had settled as a result of CE being considered at an early stage, those that had proceeded had not necessarily occupied less court time; some, in fact, had taken rather longer. The study also showed that the use of CE procedures meant that, in general, individual experts spent longer giving evidence, and this could actually increase the costs incurred by each party.

CE tends to increase the time experts spend in court

The Federal Court had, in the interim, launched its own consultation process. In its update of 16 March 2009, *Expert Evidence in the Federal Courts*, the Federal Courts Rules Committee accepted the recommendation of its subcommittee that a procedure to allow for experts to provide concurrent evidence be included in the Federal Courts Rules. However, because of concerns raised by the profession, the Committee determined that experts should not be allowed to pose questions to other experts on the panel without leave of the Court.

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Trial of CE in our courts unlikely to prove less contentious

In 2003 the practice had been made permissible in the Queensland Land and Resources Tribunal and some other jurisdictions. There was some experimentation in the courts of South Australia. Elsewhere, however, the practice met with some resistance.

It still has its supporters and detractors

Justice Geoffrey L Davies of the Court of Appeal of Queensland explained in *Civil Justice Quarterly* why the CE procedure had not been adopted in some other Australian courts. It was his perception that in some cases the expert '*came to the hot tub armed not merely as an expert witness but as an expert advocate*'. He had formed the strong view that the forensic process often exposed the expert's adversarial bias. He said that one of two possible consequences was likely at the end of the process. The first was that the judge would be left with two opposed but apparently convincing opinions by equally well-qualified experts, neither of them having been shaken in the process. The second, and, in his view, more likely consequence, was that the judge would be unwittingly convinced by the more articulate and apparently authoritative personality. The likelihood of this latter consequence increased as the complexity of the question in issue increased.

Other critics of the system claim that it can lead to a 'dumbing down' of the evidence to enable the lawyers to understand it, and that this could keep analysis at a fairly superficial level.

Whilst it has its detractors, CE also has its staunch supporters. Amongst these is the Chief Justice of the Land and Environment Court, Peter McClellan. Prior to his appointment to that court, McClellan had been at the Supreme Court, where he had introduced the CE practice. He describes this as:

> *'... a process in which the various experts, the parties, advocates and the judge engage in an endeavour to identify the issues and arrive where possible at a common resolution of them. In relation to the issues where agreement is not possible a structured discussion, with the judge as chairperson, allows the experts to give their opinions without constraint by the advocates in a forum which enables them to respond directly to each other. The judge is not confined to the opinion of one advisor but has the benefit of multiple advisors who are rigorously examined in a public forum.'*

He found that this increased settlement rates and reduced the number of issues. He had even used the technique in a murder trial.

When he was appointed to the Land and Environment Court in 2003, architects, engineers, town planners and valuers were all invited into the 'tub'. Now, every case in that court uses CE. He believes that, eventually, all cases in Australian courts involving experts will adopt this procedure.

Justice McClellan concedes that it is a '*significant intrusion into the adversarial system*' and acknowledges the practitioners's complaints that they are '*losing control*' of their experts. He responds to this by saying that this is:

> *'... one of the reasons we are doing it. We want to give experts back their proper place in helping the court to resolve disputes rather than seeing themselves, and being encouraged to see themselves, as partisan participants in an adversarial trial.'*

He says the process requires experts to work harder before the trial and give real thought to what they are going to say. He also believes that experts often respond better to questions from other experts than to examination by lay advocates.

It is interesting to note that both the supporters and the opponents of the system claim the higher ground when it comes to the question of partisanship of experts!

Most observers agree that CE can help in narrowing issues by reducing opportunities for experts to confuse and preventing advocates from pursuing irrelevant points that obscure the real issues. This is achieved because the experts know that their colleagues can expose any inappropriate answer immediately. Consequently, the evidence generally proceeds directly to the critical points of difference. Sometimes these differences will be profound, but in other cases the CE process will reveal them to be mere differences in emphasis.

The trailblazers

The Australian experiment has been observed with interest by several foreign jurisdictions. Canada has already introduced it in a limited form, and Japan has, apparently, used a similar system for some time. CE also has its supporters in the USA. And according to McClellan, there are leading British judges who have shown interest and would like to see a similar experiment here. Well, they are now to have that opportunity.

One of the recommendations made by Jackson LJ in Chapter 38 of his 500-page *Review of Civil Litigation Costs* is that the use of CE should be piloted in cases where all parties consent (4.3.ii). The results of any pilot study are to be evaluated to ascertain (a) the types of case in which CE is successful, (b) what costs are saved and (c) whether the parties and their advisers perceive the process as enabling each side's case to be considered properly. If the results are positive, then consideration should be given to amending Part 35 so that it expressly enables the judge to direct that CE be used in appropriate cases.

Given that 10 years on the Australian model remains the subject of vigorous debate in its home country, we suspect that any experiment in the English courts is likely to be similarly tortuous and to attract the same mix of praise and condemnation.

Reference

[1] *Australian Judicial Perspectives on Expert Evidence*, an empirical study. Freckelton, Reddy & Selby *Australian Institute of Judicial Administration Inc* 1999.

[2] *Managing Justice: a Review of the Federal Justice System*, Australian Law Reform Commission, 2000.

Jackson on MROs

In his *Review of Civil Litigation Costs, Final Report* published in December 2009, Lord Justice Jackson was less than complimentary about the medical reporting organisations (MROs).

MROs cause delay and unnecessary expense

Summarising the view taken by one circuit judge, Jackson LJ quotes him as saying that MROs '*add to the cost of personal injury litigation. In my experience they do not add value to the process and their use leads to delay and unnecessary expense*'. There was also a perception that, because everything had to be channelled through the agency, this created yet one more link in the chain that led to inevitable delays. The same circuit judge is also scathing about the lack of transparency in the charges made by MROs and the fact that no breakdown is provided between the fee received by the expert and that charged by the agency.

Jackson LJ referred to MROs as '*yet another group of middlemen who have recently arrived upon the scene and draw remuneration from the personal injuries process. They are enabled to do so because the rules permit their fees to be recoverable as a disbursement*'. It is implicit that not only are costs in civil litigation inflated by the existence of such extraneous layers, but there are also other disadvantages. As David Fisher of AXA Insurance said at a Cardiff seminar in June 2009:

> *'... coinciding with the withdrawal of legal aid and the introduction of CFAs there has been an increase in the number of anonymous stakeholders involved in the injury claims process such as claims management companies, medical reporting agencies and the like. Many of these organisations layer costs into the process and cause inflationary pressures as the lawyer looks to recoup the referral fee paid. Is it more than a coincidence that the increase in fraud, particularly motor fraud, corresponds with the introduction of CFAs, additional liabilities and the layering of the process by these anonymous stakeholders?'*

Of course, the report acknowledges the argument of the MROs: that they provide '*a one-stop shop*' for obtaining medical evidence all around the UK (although the expert witness directories also serve this purpose). Jackson also acknowledged their claim to have aided procedures by '*creating expert panels; arranging medical appointments; undertaking all the work associated with obtaining medical evidence; obtaining medical records; negotiating fixed rates with GPs and consultants for medical reports; and developing report writing software*'. However, he also refers to the view of one GP that MROs introduce a third party into the relationship so that authority (for example, authority to obtain additional investigations such as X-ray reports) has to be passed through the agency which then communicates with the solicitor. This, said the GP, frequently generates such delay that the patient has to return on a second occasion rather than undertake the test on the same day.

Delays of this sort can increase the time it takes for courts to deal with claims, and inefficient use of court time is certainly one area that Jackson LJ is keen to eradicate. However, the greatest inflationary pressure exerted by the MROs is almost certainly the effect on the overall cost of the medical report.

In the discussion that followed the Cardiff seminar referred to above, Fisher said that the fee typically paid to an MRO for a medical report was £195. Out of that sum, perhaps £50 is paid to the doctor and a referral fee of £50 might be paid to the solicitor. However, the remainder, around £100, is retained by the MRO. Other speakers challenged this, and there were some who believed that their arrangements with the MROs were 'cost effective'.

The Association of Medical Reporting Organisations (AMRO) points out that some medical experts have become dependent on instructions from MROs, because those experts cannot provide, for an acceptable fee, the services that MROs provide collectively. It also makes the point that many of the overheads that would normally be reflected in a GP's fees have effectively been outsourced to the MROs. The Review acknowledges this view, but also notes that those firms that are members of AMRO appear to be paying the least to doctors.

A close shave for the MROs

Initially, it was Jackson LJ's stated intention to recommend that the rules should be changed so that fees paid to medical practitioners should be recoverable as a disbursement, but fees paid to MROs should not. However, following further consideration with his assessors, he was persuaded that '*the intervention of MROs has had the overall effect of controlling the costs of obtaining medical evidence in personal injury cases. Therefore I do not, at the moment, recommend any change in the rules…*' . Given the fairly jaundiced eye with which he views the MROs elsewhere in the Review, it would be interesting to know precisely what role the assessors believe the MROs play in the overall 'controlling of costs'.

The Review does, however, strike one blow that will undoubtedly erode the position of MROs. Jackson LJ said that any restriction on the free communication between the expert and the lawyer was 'contrary to the public interest' and was liable to cause delay and increased costs. He therefore recommended that direct communication should always be permitted between a solicitor and any medical expert whom the MRO instructs on behalf of that solicitor.

Whilst some might take the view that the MROs have survived so far, it seems clear from the Review that this is something likely to be revisited in the not too distant future. The continued involvement of MROs in civil proceedings still hangs in the balance.

Jackson very nearly solved the problem of MROs...

... but they hang on to fight another day

Juror comprehension

Are jurors able to understand complex expert evidence?

Baffled by science

Developments in forensic techniques and the increasing complexity of expert evidence have led to increased criticism of the performance of juries. Criticism centres on the jury's ability to comprehend the increasing amount of complex scientific and technical evidence and its competency to resolve the conflict between the testimony of experts. The problem is not confined to the high-profile DNA cases, but also affects areas such as intellectual property, statistics, securities, financial fraud, computer crime and product liability.

Critics of the present jury system also allege that in long and complex trials jurors will have difficulty in understanding and remembering any instructions they have been given and will base their decisions less on the evidence and more on the perceived status and persuasiveness of the expert witness. They will, say the critics, become more susceptible to 'junk science' and emotional appeals. In the face of this, there have been calls for juror comprehension of expert evidence to be reviewed. And it has been suggested that a reform agenda be put in place to address the main areas of criticism.

Where is the evidence?

In the United States, the relationship between juries and expert witnesses has been the subject of much study. Juror comprehension of complex scientific data and the effect on possible outcomes has been tested and the results made available for academic discussion. The Law Commission's consultation paper on expert evidence (see *Your Witness* 56 & 57) contains a small number of footnote references to these studies without giving specific detail or analysing the implications of such research.

Whether or not reform is necessary does, of course, depend on whether the critics are justified in their fears. A belief commonly held is that '*juries are frequently incapable of critically evaluating expert testimony, are easily confused, give inordinate weight to expert evidence, are awed by science and defer to the opinions of unreliable experts*' (Vidmar, Lempert *et al.* in *Law & Human Behaviour,* **387**, 388). But are they justified in such a belief?

Evidence from the USA suggests they are

Those married to this view might put forward all manner of alternatives to the existing jury system in complex cases. These range from the suggestion that it be abandoned altogether in favour of specialist 'science courts' with panels of experts, to the proposal that the courtroom should be turned into a quasi lecture room for the education of judge and jury alike.

The consensus of most of the papers written on this subject in more recent times appears to be that there are five distinct measures the court could take that might lead to an increase in juror comprehension. These can be summarised as follows:

- Allowing jurors to take, and place more emphasis on, their own written notes, made during the course of the trial evidence.
- Providing jurors with more written material, including summaries of the agreed evidence.
- Providing more in the way of technological aids, such as charts, diagrams and tables.
- Allowing jurors to put direct questions to the witness, rather than merely passing to the judge written requests for clarification.
- Allowing jurors to meet in conference and discuss issues raised by the evidence at early and continuing stages throughout the trial.

Those opposed to such measures argue that these would, *inter alia*, cause jurors to place too much reliance on written materials that might (i) contain errors, (ii) not record such other factors as the demeanour of the witness, and/or (iii) become too voluminous and distracting. They say that jurors could become too reliant on written material provided to them (which might depend too heavily on the judge's own views and assessment) and pay less attention to oral testimony. Some feel that, if it were permitted, direct questions to experts would more likely be asked by those jurors with the greatest understanding of the evidence; those jurors having difficulties would be less likely to seek clarification. Similarly, it would be those with the strongest views and the most confidence who would lead the debate in any discussion forum, and thus influence the decision of the weaker members.

Lessons from across the pond

There is a presumption amongst those who seek change that jurors are simply no longer competent to make decisions in complex cases – that the intelligence of the average juror is not up to the task of following expert evidence which is of a highly technical nature. But is this correct?

Studies in the USA indicate that this is not so. Indeed, jurors were found to be capable of resolving highly complex cases and understanding the most technical of evidence.

In an experiment conducted in Wilmington, Delaware, 60 mock trials were staged using 480 persons eligible for jury service, judges of the Superior Court and four volunteer experts in the field of DNA. The mock trials were held in test conditions. The jurors watched a videotaped armed robbery trial that featured conflicting testimony from experts regarding DNA evidence. Some mock juries simply watched the videotape and deliberated on a verdict. Others were permitted to take notes, ask questions about the scientific evidence, use a checklist, or refer to jury notebooks containing materials about the DNA in the case.

Ten mock juries decided the case without the benefit of any innovations. Ten mock juries in each of five other conditions were permitted to use one or more jury innovations to decide the case. The results of the tests were illuminating.

Whilst many jurors reported that aids (such as note taking) were useful, there was no real difference in the decisions made by the various groups. The test revealed that some jurors experienced difficulty with the expert evidence on statistical and probability matching but, in general, 90% of the test sample demonstrated an adequate understanding of the scientific evidence. This and other similar studies have shown that the great majority of jurors do not give up in the face of difficult or complex expert evidence, but work hard to understand it and take their responsibilities as jurors very seriously.

The trial on trial

Most of the jury comprehension tests show that it is not the expert evidence that confuses juries but the trial process itself. The jury's ability to follow the evidence may be affected by such things as:

- the length of the trial
- confusing instructions or failing to follow their instructions properly
- non-sequential presentation of evidence
- errors by advocates
- judges's rulings on and admissibility of certain parts of the evidence.

Juries were sometimes distracted and confused by the adversarial nature of conflicting expert evidence and the personalities of the experts, but it was not the expert evidence itself that was the problem.

Note or not?

Analysis of many of the test results shows that jury confidence is a significant factor in determining how jurors deal with the trial process and the evidence. Allowing jurors to take their own notes was found to be one innovation that seemed to increase jury confidence. Writing notes also helped to keep the jurors more engaged. However, it is doubtful whether it is proven that note taking actively improves comprehension of the evidence.

In 1994, a study published by Heuer and Penrod found 'no significant differences' between note takers and non-note takers with respect to recall of evidence or satisfaction with the trials or verdicts. The paper '*Jury Trial Innovations*' published by the National Center for State Courts in 1997 highlights some other potential drawbacks. These were that:

- note taking might distract the juror
- jurors might place too much reliance on the notes, and
- the most active note takers amongst the jurors might dominate the jury's deliberations.

Similarly, tests have shown that allowing jurors to put questions to experts helped with juror confidence and to engage the juror with the trial process. But, again, it is not proven that this assists with comprehension of the evidence. *Jury Trial Innovations* raised the concerns that:

- jurors may use questions to become advocates of their views
- jurors draw adverse inferences from the judge's failure to allow some questions, and
- the process would interrupt and prolong the trial.

Heuer and Penrod's study concluded that there was insufficient evidence to support the claim that the process would uncover important evidence or lead to greater overall juror satisfaction with the trial. However, their data did not bear out the concerns that permitting juror questions would be unduly disruptive, would prolong the trial, would unfairly surprise the lawyers or would burden the judge, or that jurors's questions would be 'inappropriate'. The authors concluded that the innovation deserved serious consideration by policy-makers.

In 1999, a pilot project was undertaken in the Los Angeles Superior Court. The vast majority of jurors (92%) who were permitted to ask questions of the witness reported a positive opinion of the process. Indeed, most felt that this had improved their role as decision-makers and made them feel more involved in the trial. Of the judges involved, 93% said that the process did not unduly prolong trials.

Getting jurors more engaged

All of these innovations can boost a jury's confidence in its abilities and lead to a feeling that jurors are more engaged with the trial and the decision-making process. However, no study has shown conclusively that such developments have helped with the juror's comprehension and analysis of the expert evidence.

The majority of the mock jurors in the Delaware experiment had a positive view of science. They believed that 'science and technology are making our lives healthier, easier, and more comfortable.' Although they found the issues posed by the scientific evidence to be challenging, they did not shy away from it and were generally rigorous in their efforts to understand it. It appears that there is no discernable difference between the decisions reached by juries permitted the use of innovations and those that are not. Neither is the professional or academic background of individual jurors thought to be of any great significance.

Summarising the conclusions of tests in the USA, it is probably fair to say that jury innovations can, in some cases, make the trial process an easier and more positive experience for jurors. But such innovations are not likely to aid juror comprehension of scientific evidence to any significant degree. Indeed, one might conclude that the ability of jurors to understand complex expert evidence might hitherto have been underestimated. If we were allowed to undertake research on juries, we suspect that any tests undertaken in the UK would deliver essentially the same results.

It's the nature of the trial process that causes problems

Jury innovations can make the trial process a more positive experience

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You can choose to submit yourself to regular scrutiny by instructing lawyers in a number of key areas. This would both enhance your expert profile and give you access to the 2010 dated logo. The results of the re-vetting process are published in summary form in the printed *Register*, and in detail in the software and on-line versions of the *Register*.

Profiles and CVs – FREE

As part of our service to members of the legal profession, we provide free access to more detailed information on our listed expert witnesses. At no charge, experts may submit:

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