What's the crack?

Chris Pamplin analyses a case of cracking brinkmanship

The Ministry of Justice (MoJ) consultation paper, *Legal Aid: Funding Reforms*, which included proposals on expert fees was published last summer. The MoJ suggested introducing caps on the hourly charging rates for expert witnesses paid by the Legal Services Commission (LSC) that represent a significant cut on current average fee rates.

The MoJ received a large number of submissions in response. The overwhelming message from experts and lawyers was that implementing the fee capping proposal on experts would very seriously reduce the pool of experts willing to undertake publicly funded work. The MoJ has accepted that its proposals cannot go ahead and it needs to know much more about what it actually pays for! (Unbelievably, the payments made to expert witnesses are not specifically recorded by the LSC.)

While working to help the MoJ to obtain this deeper insight, the *UK Register of Expert Witnesses* has become aware of a number of issues that appear to offer far greater cost savings to the MoJ than those being sought through its work on expert witness fees. These include outline reports, staged instruction, earlier involvement of expert witnesses, value for money metrics, better instructions to prosecution expert witnesses and tackling late payment. But perhaps the simplest and most effective way to save money is to deal with wasted court dates.

Court statistics quarterly

The MoJ publishes quarterly court statistics (see *http://www.justice.gov.uk/publications/docs/court-stats-quarterly-q1-jan-mar-2010.pdf*). In these, the outcome of each main trial is recorded as either effective, ineffective or cracked. An "effective" trial is one that commences on a scheduled date and reaches a conclusion. An "ineffective" trial does not commence on the due date and requires re-listing. A "cracked" trial does not commence on the day and the trial is not re-listed.

In the first quarter of 2010, around 11,100 trials were recorded in the Crown Court, of which 43% were recorded as effective, 14% were recorded as ineffective and 43% were recorded as cracked. In the same period, around 47,600 trials were recorded in magistrates' courts, of which 44% were recorded as effective, 19% were recorded as ineffective and 37% were recorded as cracked.

So, in the first three months of 2010, *c.* 40% of criminal cases (amounting to more than 22,000 cases) did not go ahead on the day. Why should this be?

Cracks in the system

According to the MoJ statistical report, "cracked trials are usually the result of an acceptable plea being entered by the defendant on the day, or where the prosecution offers no evidence against the defendant." But in how many of these cases did the defendant change his plea to guilty (for surely only that would "crack" the trial) without any change in the evidence against him? In such cases, it is only the view over the precipice that has persuaded the defendant to 'see reason' and abandon any self-denial.

Likewise, in the absence of any change in the evidential base, why should it take the prosecution to reach the steps of the court before recognising that they did not have a strong enough case? Is that not the sign of shoddy workmanship—or an under-funded prosecution service?

Turning to the civil courts for a moment, why do opposing parties so often settle at the doors of the civil court? Surely it is because that is the last opportunity they have to "do a deal". The parties and their lawyers play out the time-honoured game of ratcheting up the pressure in an attempt to force the other side to agree a compromise. In other words, it is simple brinkmanship.

But all this self-denial, shoddy work and brinkmanship has an enormous associated cost that others bear. It isn't just the parties and their lawyers who waste time preparing for, travelling to and waiting in courthouses across the country. It is also the witnesses (ordinary and expert), court officers and the judge who get dragged along for the ride.

Back away from the brink

The psychology behind trial dates being seen by parties to litigation, those who advise them and the prosecution authorities as the ultimate brink point is no mystery. But what is so sacrosanct about the trial itself? Why do we allow that to be the brink that causes *c.* 40% of criminal cases to "crack"?

Much of the innovation wrought by the Civil and Criminal Procedure Rules has been aimed at better case management leading to greater efficiency and cost savings. This matter is no different. If the court created a new brink, say three weeks before the trial date, perhaps by using the procedure rules to put sentencing or costs sanctions in place after that date, could we not use the psychology to encourage people to change plea, settle or acknowledge there is no prospect of the prosecution succeeding, well in advance of the trial?

The time-tabling difficulties experienced by the court would be reduced greatly if those cases that did get listed were very likely to proceed. Savings wouldn't just come from better use of court buildings. The *UK Register of Expert Witnesses* hears many anecdotes from expert witnesses who have been paid for turning up to court only to be sent away because the trial does not proceed. Believe me, busy expert witnesses would be very pleased to lose this income if they recovered the wasted time!

The creation of a new brink point more distant from the trial date would not need to change many people's actions before it realised significant cost savings. Indeed, far greater savings could be achieved by this simple amendment than by the current MoJ attempt to get a handle on expert witness fees paid in publicly funded cases—an attempt that many fear will risk a severe reduction in the pool of experts willing to work on publicly funded cases. In contrast, better time-tabling would certainly improve the willingness of busy professionals to undertake expert witness work. NLJ

Dr Chris Pamplin, editor, UK Register of Expert Witnesses. Website: *www.ukregisterofexpertwitnesses.co.uk*