TRUST ME:
I'M AN EXPERT

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Introduction[1]

This paper considers the following issues:

- Expert immunity, and the implications of the decision in *Jones v Kaney* (2011);[2]
- Legal professional privilege and experts' reports after *Edwards-Tubb v JD Wetherspoon* (2011);[3]
- Selecting the right expert, and the guidance in *BSkyB v HP Enterprise Services*[4] and *Henderson, Butler and Oyediran* (2010);[5]
- The need for expert input before alleging professional negligence since *Pantelli Associates v Corporate City Developments* (2010);[6]
- Objective unbiased opinion, in the light of *Stanley v Rawlinson* (2011);[7]
- Dealing with joint experts after *Thorpe v Fellowes* (2011);[8]
- Identifying what the judge wants, with the help of *Compania Sud Americana de Vapores SA v Sinochem Tianjin Import and Export* (2009)[9]
- Hot-tubbing – presently being piloted in the courts.

Before we deal with these points, we need to consider one basic underlying question: what is expert evidence?

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1 This paper is based upon the law of England and Wales. It is only intended to provoke and stimulate; it does not constitute advice. Detailed professional advice should be obtained before taking or refraining from taking action in relation to the material in this paper.

2 *Jones v Kaney* [2011] UKSC 13, [2011] 2 All ER 671, [2011] 2 WLR 823, [2011] BLR 283, 135 Con LR 1.

3 *Edwards-Tubb v JD Wetherspoon Plc* [2011] EWCA Civ 136, [2011] 1 WLR 1373.

4 *BSkyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC).

5 *Henderson, Butler and Oyediran* [2010] EWCA Crim 1269, [2010] 2 Cr App R 185.

6 *Pantelli Associates Ltd v Corporate City Developments Number Two Ltd* [2010] EWHC 3189 (TCC), [2011] PNLR 12.

7 *Stanley v Rawlinson* [2011] EWCA Civ 405.

8 *Thorpe v Fellowes Solicitors LLP* [2011] EWHC 61 (QB), [2011] PNLR 13.

9 *Compania Sud Americana de Vapores SA v Sinochem Tianjin Import and Export Corporation (The Aconcagua)* [2009] EWHC 1880 (Comm), [2010] 1 Lloyd's Rep 1.

What is expert evidence?

Experts are in a privileged position. They give opinion evidence. They furnish specialist knowledge. They provide information that is likely to be outside the experience and knowledge of the court. Factual witnesses can speak only about what they directly saw or were involved in. They cannot, generally, give opinion evidence. The distinction between the two is not clear-cut: the witness who says that the driver of the car was obviously drunk mixes fact and opinion in a way that is difficult to disentangle in practice. Moreover a specialist witness (an engineer or an accountant) may be both an expert witness and a witness of fact.

The area is further complicated by the rapid recent growth in technology and scientific knowledge. Evidence is given in new and developing areas, and on topics that do not immediately seem plausible. We can illustrate this with two examples, both from criminal cases:

- In *Dallagher*, the jury was faced with experts on ear prints.[10] The defendant's conviction for murder was based on expert opinion evidence relating to the comparison of an ear print made by the defendant with a latent ear print found on a window. At the defendant's trial, one of the prosecution experts said that he was 'absolutely convinced' that the defendant had left the latent print. A second prosecution expert was willing to accept only a 'remote possibility' that the latent print had been left by someone else. However, DNA evidence taken from the latent print subsequently established that it had not been left by the defendant. The defendant's conviction was quashed, after he had spent almost seven years in prison. There simply was an insufficient body of research data to support a hypothesis or assumption that every human ear leaves a unique print and that the identity of an offender could be confidently determined solely on the basis of an ear-print comparison.
- Until *Harris and others*,[11] the prosecution could rely on a hypothesis that a non-accidental head injury to a young child could confidently be inferred from nothing more than the presence of a particular triad of intra-cranial injuries. Convictions for very serious offences – including murder – were obtained. The empirical research that underpinned this approach was in fact a small, poor-quality database.

The admissibility of expert evidence

The nearest we have to a working test to determine the admissibility of expert opinion was set out by King CJ in a South Australian case, *R v Bonython*.[12]

10 *Dallagher* [2002] EWCA Crim 1903, [2005] 1 Cr App R 12.

11 *Harris and others* [2005] EWCA Crim 1980, [2006] 1 Cr App R 5.

12 *R v Bonython* (1984) 38 SASR 45, 46-47 (Sth Australia Supreme Ct), applied, for example, by Aikens J in *JP Morgan Chase Bank v Springwell Navigation Corp* [2006] EWHC 2755 (Comm), [2007] 1 All ER (Comm) 549.

The judge identified two questions that had to be decided before allowing the opinion of a witness into evidence as expert testimony.

The first was**:** 'whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible'. He divided this first question into two parts:

> '(a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area; and
>
> (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which of the witness would render his opinion of assistance to the court.'

The second was:

> 'whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issue before the court.'

The application of these tests has come under increasing scrutiny in the criminal courts.[13] In 2011 the Law Commission suggested reform: the incorporation of the current common law tests into a statutory admissibility test for expert evidence, comprising a number of elements including reliability and impartiality.[14]

Lessons for practitioners in civil cases?

We do not appear to have quite the same problems. Perhaps this illustrates the simple fact that in those civil cases which get to the stage of expert evidence, all parties can fund the necessary work to challenge and investigate the expert and his claimed expertise. However cases such as *Dallagher*[15] and *Harris*[16] serve as a salutary reminder to take nothing for granted. Challenge the research, challenge the hypothesis.

A problem may arise in mounting that challenge: the expert's sources may not be immediately available. In the recent case of *Ahmed,*[17] the Court of Appeal

13 Leveson LJ has doubted whether the 'reliable body of knowledge' second limb of the first question in *Bonython* is the current law: see his speech to the Forensic Science Society, *Expert Evidence in Criminal Courts – The Problem* (King's College London, 16th November 2010, accessible via www.forensic-science-society.org.uk). However, the Court of Appeal in *Reed* [2009] EWCA Crim 2698 at [111] and *Broughton* [2010] EWCA Crim 549 at [32] indicated that it was. See also the summary in *Ahmed* [2011] EWCA Crim 184 at [57].

14 Law Commission, *Expert Evidence in Criminal Proceedings in England & Wales* (Law Com No 325, March 2011), downloadable from www.justice.gov.uk/lawcommission.

15 *Dallagher*: note 10.

16 *Harris*: note 11.

17 *Ahmed*: note 13.

considered the admissibility of expert evidence relating to terrorism in a criminal trial. (Such a point could arise in a civil dispute about insurance policy coverage for acts of terrorism). One of the issues on appeal against the conviction of two men for terrorist offences was whether Professor Clarke's evidence at trial about the nature of Al Qaeda, its methods (including its areas of operation) and its organization should have been permitted. That evidence included reliance on secret sources and Professor Clark agreed in cross-examination that he was engaged upon 'a first draft of history'.

The Court of Appeal's view in *Ahmed* was that Professor Clarke's materials were both appropriate and legitimate and his methods of assessment were properly academic. It was for the defence to cross-examine him on his sources and their reliability. The fact that he relied on secret information in his work was no bar to his evidence being admitted. The Court of Appeal agreed that an expert should not be called as a device to avoid the ordinary rules of evidence, and that if an expert's evidence were effectively unchallengeable because based on sources he refused to expose to scrutiny that would be likely to be a reason for refusing to admit it. But neither of those situations applied in the case.

In this context, note Coulson J's approach to the valuer expert in *Lincoln v Richard Ellis Hotels.*[18] The valuer claimed privilege and confidentiality in original material which he relied on in his report. The judge did not accept that the relevant information could possibly be privileged or confidential. As he said, this claim exacerbated the impression he had formed that the expert:

> '… was attempting to make a case by putting forward one item of carefully selected information, without allowing the Defendants an opportunity to undertake any sort of proper check or comparison.'[19]

This expert's views were not followed.

Expert immunity and *Jones v Kaney* (2011)[20]

Background

For a very long time, the courts have resisted attempts by disappointed litigants to sue witnesses. As Kelly CB said in *Dawkins v Lord Rokeby*:

> '… no action lies against parties or witnesses for anything said or done, although falsely and maliciously and without any reasonable or probable cause, in the ordinary course of any proceeding in a court of justice.'[21]

Until this year there were two leading cases about expert immunity, both of which reflect the position of advocates before *Hall v Simons*:[22]

18 *K/S Lincoln v CB Richard Ellis Hotels Ltd (No 2)* [2010] EWHC 1156 (TCC).
19 *Lincoln v CB Richard Ellis Hotels Ltd*, note 18, para [176].
20 *Jones v Kaney*: note 2. See Judge Anthony Thornton QC, 'The Regulation of Construction Experts after *Jones v Kaney*' SCL Paper 173 (February 2012) <www.scl.org.uk>
21 *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 (Exchequer Chamber).
22 *Arthur JS Hall & Co v Simons* [2000] UKHL 38, [2002] 1 AC 615.

- *Palmer v Durnford Ford*, decided by Simon Tuckey QC in 1992:[23] this made clear that preparatory advice to a client was subject to an actionable duty of care
- *Stanton v Callaghan*, decided by the Court of Appeal in 1998.[24] The immunity extended to evidence given in court, and the preparation of reports and joint statements which were adopted as evidence. It also extended to activities conducted for the substantial purpose of litigation.

Although immune from civil suit, experts could be subject to costs orders and disciplinary proceedings.[25]

However, the issue has now been revisited by the Supreme Court. The claim in *Jones v Kaney*[26] arose out of a joint experts' meeting. Mr Jones was knocked off his motorcycle by a car driven by a drunk, uninsured and disqualified driver. He sued the driver of the car that knocked him over. Liability was admitted. Mr Jones said he suffered significant physical and psychiatric injuries including: post-traumatic stress disorder (PTSD), depression, an adjustment disorder and associated illness behaviour which manifested itself in chronic pain syndrome. Mr Jones retained Dr Kaney, an expert clinical psychologist.

Dr Kaney's initial report supported Mr Jones' claim that he was suffering from PTSD. However, following a telephone conference with the opposing expert, Dr Kaney signed a joint statement agreeing that Mr Jones did not have PTSD and that she had found Mr Jones to be 'deceptive and deceitful'.

We do not yet know Dr Kaney's case on the merits, since her team entered a defence that simply claimed immunity. On the basis of the case against her, when questioned by Mr Jones' solicitors, Dr Kaney said:

- She had not seen the opposing expert's report at the time of the telephone discussion with him
- The opposing expert had drafted the Joint Statement, which did not reflect what she had agreed in that telephone conversation but she had felt under some pressure to sign it
- Her true view was that Mr Jones had been evasive, not deceptive, and had suffered PTSD but had recovered.

Mr Jones alleged that the underlying action settled for considerably less than it would have done, had Dr Kaney not signed the joint statement.

Dr Kaney's application to strike out the claim succeeded at first instance.[27] Blake J held that he was bound by the previous authorities but made it clear

23 *Palmer v Durnford Ford* [1992] QB 483 (QB).
24 *Stanton v Callaghan* [2000] 1 QB 75 (CA).
25 *Phillips v Symes* [2004] EWHC 2330 (Ch) and *Meadow v GMC* [2006] EWCA Civ 1390, [2007] QB 462.
26 *Jones v Kaney*: note 2.
27 *Jones v Kaney* [2010] EWHC 61 (QB).

that he doubted whether this immunity would withstand re-examination by a superior court, so gave permission to appeal direct to the Supreme Court.

The Supreme Court

The Supreme Court by a majority (5-2) allowed the appeal. Lords Phillips, Brown, Collins, Kerr and Dyson were in the majority. Lord Hope and Lady Hale dissented.

Counsel for Mr Jones was at pains to make submissions on a narrow basis: whether the act of preparing a joint witness statement is one in respect of which an expert witness enjoys immunity from suit.[28] But everyone recognised that the appeal raised wider issues of principle. The majority gave primacy to the rule that every wrong should have a remedy. Dr Kaney had failed to discharge the onus that was on her to justify the exception to this principle that she relied on – immunity from suit.

The majority saw an expert as occupying a position closer to that of an advocate than a witness. There was a marked difference between holding the expert witness immune from liability for breach of the duty that he had undertaken to a claimant and granting immunity to a witness of fact from liability against a claim for defamation or some other claim in tort, where the witness may not have volunteered to give evidence and owed no duty to the claimant. To the majority, there was no justification for the assumption that the removal of immunity would have a 'chilling effect', in the sense that expert witnesses would be reluctant to provide their services at all or to carry out their duty to the court.

The minority took a different starting position. There was already binding House of Lords' authority establishing immunity for experts. The issue was whether this rule should be departed from. There was no principled or clear basis for doing so. It was a matter for the Law Commission and Parliament.

The implications

It is clear that experts are still immune from defamation suits.

The fact that an expert cannot be sued by the other side in the original litigation has been reaffirmed. In *Baxendale-Walker v Middleton*,[29] the claimant was a former solicitor who had developed and advised on tax avoidance schemes. The claim arose out of regulatory proceedings that had been brought against him. The claimant sued nine defendants. The first and second defendants were employed by the SRA. The third defendant was the Law Society/SRA. The fourth and sixth defendants were partners in the seventh defendant, an accountancy firm engaged by the Law Society/SRA to produce a report on the legality of some of the tax avoidance schemes devised and promoted by the claimant. The fifth defendant had assisted the fourth defendant in producing the report. The eighth defendant was the chairman of

28 *Jones v Kaney*, note 2, para [22].

29 *Baxendale-Walker v Middleton* [2011] EWHC 998 (QB), [2011] All ER (D) 242.

the ninth defendant, the Solicitors Disciplinary Tribunal, which decided that the claimant should be struck off the roll. The claim was based on conspiracy to injure, conspiracy to defraud, conspiracy to use unlawful means, malicious falsehood and misfeasance in public office. The claimant valued the claim at £229.7m. All but one of the defendants applied to strike out the claims, and were successful. Supperstone J held that *Jones v Kaney* did not touch on the immunity of a witness (whether of fact or expert opinion) or a party to proceedings in respect of things said or done in the ordinary course of proceedings in respect of claims brought against him by an opposing party; or the law on judicial immunity.

We can see no reason not to apply *Jones v Kaney* to experts in arbitration and in adjudication. Bear in mind, however, that there will be issues about the confidentiality of arbitral proceedings when suing an expert who gave evidence before an arbitral tribunal. You may want to consider including an arbitration clause in the expert's retainer.

It must be assumed that the immunity was removed retrospectively – Lord Hope clearly stated that he assumed it was.[30] Are clients and solicitors looking at old files for the cases that were lost because of unsatisfactory expert evidence? There seemed to be a surge in professional negligence claims against barristers as a result of the loss of immunity in *Hall v Simons*. Will there be a similar surge of claims in the light of *Jones v Kaney*? Will there be a surge of vexatious claims?

Lord Phillips doubted that this would happen:

- It is clear that evidence from another expert in support will be needed – Lord Phillips described such a claim as 'unviable' without the support of such an expert.[31]
- He did not envisage the rare litigant, with the resources to fund such a claim, throwing money away on proceedings he is advised are without merit.
- In Lord Phillips' view, the litigant without such resources who was seeking to sue a diligent expert who had made damaging concessions would be unlikely to be able to fund litigation.
- He was confident that a litigant in person who sought to bring such a claim without professional support would be unable to plead a coherent case and would be susceptible to a strike-out application.

Will the courts' deliver the promised protection and strike out the frivolous claim? Will the same line be applied to experts in criminal and family law cases (both private and public)?

- Counsel for the claimant expressly said that it was no part of his argument that experts in criminal cases or family law cases should not be immune.[32]

30 *Jones v Kaney*, note 2, para [128].
31 *Jones v Kaney*, note 2, para [59].
32 *Jones v* Kaney, note 2, para [153].

- But all, including Lord Hope in the minority, acknowledged that it was difficult as a matter of principle to draw a distinction.
- Lord Hope said that the loss of immunity would be a matter of particular concern in criminal courts: 'The expert for the prosecution would continue to enjoy the immunity from proceedings at the instance of the defendant. The expert for the defence would have it removed from him. One cannot discount the fact that exposure to the risk of incurring the expense and distress of a harassing litigation at the client's instance should the defence fail, however unlikely, will colour his evidence. The public interest surely demands that experts who give evidence on either side in criminal proceedings are free from pressures of that kind.'[33]
- Both Lord Hope and Lady Hale were concerned about the implications for private and public law family cases. Lady Hale identified a number of types of witness such as healthcare professionals and social workers involved in such cases and asked whether they were to be potentially liable to whoever instructed them for all or part of their evidence and what the basis was for such liability – was liability to depend on whether such witness was paid a fee specifically for her appearance in court, or provided her assessment as part of her ordinary duties to the health or social care services, who may not be party to the proceedings, or provides it as part of a special arrangement between the agencies. She pointed out that, in many family cases, if the law is to be changed, there will be some professional witnesses who enjoy immunity in respect of their evidence and some who do not. Some of those distinctions will appear arbitrary. Whereas in the past, all enjoyed the same immunity, in the future only some will do so. This will introduce a dimension to the interactions between the experts, and between the experts and the courts which was not there before. To what extent will the court, in evaluating an expert's evidence, take account of that expert's potential liability to a client or the lack of it?[34]
- Lord Phillips conceded that the risk of vexatious claims from those convicted of criminal offences might be greater. But, relying on *Hunter v Chief Constable of the West Midlands Police*,[35] he said that such claims would be struck out as an abuse of process unless the convicted client first succeeded in getting his conviction overturned on appeal,

Is this the start of the loss of witness immunity? What about other witnesses who are in reality giving expert evidence or giving evidence pursuant to a contract? Can such witnesses now be sued for mistakes in their evidence by the party who called them? Consider the following:

33 *Jones v Kaney*, note 2, para [169].
34 *Jones v Kaney*, note 2, paras [184] to [187].
35 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL), para [60].

1. *A witness whose involvement with the litigation is based on contractual duties or carried out for reward* – such as a process server or the company director who owes a duty to the company to promote its interests but is said to have made an inexcusable error when giving evidence: a question raised by Lord Hope.[36]

2. *The person who owes contractual duties of confidence* – is he to be liable for any breach of confidence in a witness statement where he may not be able to rely on the defence of compulsion? There may be a need to consider obtaining a witness summons to protect such a witness.

3. *A company or firm providing professional services suing for fees*. The professional who provided such services can give opinion evidence as to the value of the work done**.**[37]

4. *A company or firm providing professional services being sued for negligence*. In professional negligence claims, in the TCC in particular, the defendant company/firm often calls as a witness the professional/employee whose judgment is impugned. That person often gives opinion evidence explaining why he considers his conduct did not fall below the standard of care reasonably to be expected of him and referring to the professional literature reasonably available to him or to the reasonable limits of his professional experience or as one professional against another. It may lack objectivity, but that goes to its cogency, not its admissibility.[38]

5. *The engineer brought in by a claimant to design remedial works which are subsequently challenged as excessive*: he may give evidence about his design and refer to his experience of rectifying comparable building failures in the past. Such evidence is common and admissible. The TCC recognises that such evidence (as well as that in (4) above) is usually valuable and often leads to considerable cost savings.[39]

Lord Phillips held that experts were to be distinguished from other witnesses because they chose to provide their services and voluntarily undertook duties to their clients for reward under contract. However, the primacy given to the principle 'where there is a wrong, there must be a remedy' may suggest that some at least of these other witnesses are threatened by a loss of immunity.

What about joint experts? Lord Hope expressly posed the question but did not answer it.[40] Lady Hale pointed out that such an expert:

36 *Jones v Kaney*, note 2, para [172].
37 *Lusty v Finsbury Securities Ltd* (1991) 58 BLR 66 (CA).
38 *DN v London Borough of Greenwich* [2004] EWCA Civ 1659, paras [25] - [26].
39 *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2220 (TCC), paras [657] - [676].
40 *Jones v Kaney*, note 2, para [172].

> '… is extremely likely to disappoint one of those instructing her [*and*] may be more vulnerable to such actions than is the expert instructed by one party alone.'[41]

Will it be harder to find an expert? Will experts (and their insurers) be willing to give evidence in difficult or challenging cases without immunity?

- The Supreme Court majority was unimpressed by this argument but there was no evidence put before it on the issue.
- To an extent it is, and can only be a matter of impression at this stage.
- The risk of a claim and all its attendant stress and adverse publicity, plus the increased costs of obtaining insurance cover, may make acting as an expert witness just too unattractive.
- Whilst the professional expert probably already has an insurance policy, the busy successful professional who is seldom asked to provide an expert opinion may take the view that it is no longer worthwhile agreeing to do so.
- This may however remove some of the less able, and thus less used, experts from the market.

Will experts be more reluctant to say the unpalatable?

- Again, the majority was unimpressed by the argument.
- We cannot help wondering if experts will be quite as frank as Dr Kaney appears to have been in explaining what had gone wrong in agreeing the Joint Statement if they do not have immunity. Without such evidence, there is no prospect of persuading a judge to allow another expert in the underlying claim and the parties are doomed to delay and expensive parallel litigation. Is this really desirable?

Will it be more expensive to engage an expert? Insurance costs money and the insurance premium will be passed onto the litigant.

Will experts now seek to exclude or limit their liability? Lord Collins was of the view that experts who could not get insurance could limit their liability by contract – but would such a clause be enforceable?

Will the expert's retainer become disclosable? Should the judge know that one expert has excluded or limited liability while the other expert has not?

Subsequent decisions

There have been three decisions since *Jones v Kaney*. We have dealt with *Baxendale-Walker* above.[42] The claim in *Warner v Pennington*[43] turned on the construction of the care consultant's report. The Court of Appeal held that her

41 *Jones v Kaney*, note 2, para [182].
42 *Baxendale-Walker*: note 29 and linked main text.
43 *Warner v Pennington* [2011] EWCA Civ 337.

report would have conveyed the material advice to a reasonable solicitor. The third case is *Ridgeland Properties Ltd v Bristol City Council*,[44] where the Court of Appeal heard an appeal against a decision of the Upper Tribunal determining £4.5m as the compensation payable for the compulsory acquisition of the appellant's property in Bristol. There was only one ground of appeal: that the UT wrongly refused the appellant's application to re-open the hearing in order to permit further evidence to be given of three offer letters of between £15.3m and £23m for the property. The Court of Appeal took the view that the appellant's ability to obtain redress from its expert witness and/or previous solicitors, if it explained the failure to refer to the three offers, was a powerful reason for not permitting the appellant to mount an entirely new valuation case before the tribunal.

Legal professional privilege and experts' reports after *Edwards-Tubb v Wetherspoon* (2010)[45]

We turn now to look at 'expert shopping'; or, depending on your viewpoint, 'a second attempt to instruct a competent expert'. Before turning to the recent developments in case law, we need to look at the position both before and after proceedings are commenced and remind ourselves about the principles of legal professional privilege.

Background: Pre-Action Protocols

Under the PAPs, parties are encouraged to engage experts at the earliest possible stages. For example, the PAP for Construction and Engineering Disputes requires the parties' letters of claim and response to set out the names of any experts already instructed on whose evidence they intend to rely, identifying the issues to which that evidence will be directed. The parties have also to consider during the pre-action process how expert evidence is to be dealt with; and the PAP for Personal Injury Claims requires any party to give notice to the other party of the names of experts they may instruct and give them an opportunity to object to any of those experts. The aim is to ensure that an expert is appointed in whom all parties have confidence.

As we all know, a court may subsequently take into account a party's failure to comply with a PAP. For example, CPR 3.1(4) provides that the court will take into account whether or not a party has complied with the Practice Direction (Pre-Action Conduct) and any relevant PAP when making directions; and CPR 3.1(5) allows a court to order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant PAP.

Privilege

An expert's report, obtained by the claimant or the defendant for the purposes of advice about, and the conduct of, litigation is a privileged document. The party's right to keep this document to himself is a substantive right in law.

44 *Ridgeland Properties Ltd v Bristol City Council* [2011] EWCA Civ 649.
45 *Edwards-Tubb v JD Wetherspoon Plc*: note 3.

There is no question of balancing privilege against other considerations of public interest; the balancing act was accomplished many years ago and resolved by preserving the right of privilege. Thus Longmore LJ in the lead judgment in *Jackson v Marley Davenport* noted that it was common for drafts of expert reports to be circulated among a party's advisers before a final report was prepared for exchange with the other side.[46] Such initial reports were privileged. A person in possession of a privileged document cannot be criticised for claiming the privilege and declining to waive it, nor can any adverse inference be drawn against him from his claim.[47]

Can you change your expert?

Let us start with the situation where litigation has commenced and the desire to change comes after the early pleadings stage. CPR 35.4 makes it clear that in all actions the parties need permission to rely on expert evidence: 'No party may call an expert or put in evidence an expert's report without the court's permission'. Assume that permission was duly given, and your client has reviewed the expert's draft expert report and is very unhappy. For the usual reasons, your client wants to change expert at once. Can he?

The first question is: do you need the court's permission to change experts? You will do in a number of circumstances, including where:

- Your expert is named in the order giving permission to use expert evidence
- Your expert has attended meetings or inspections with the other side or its expert and so a change means you need an order for further meetings or inspections
- Your first expert's report has been supplied to the other side for trial.

In these situations, the position has been clear for some time. 'Expert shopping' is positively discouraged in two ways: permission will be given only in limited circumstances; and permission will be conditional on disclosure of the first expert's report.

In *Stallwood v David*,[48] the parties' experts met and produced a joint report in which the claimant's expert significantly changed his position. Teare J accepted that CPR 35 did not rule out the granting of permission to call a further expert, but said it would be a rare case where that would be appropriate. Such an order should only be made:

> '…where there is good reason to suppose that the applicant's first expert has agreed with the expert instructed by the other side or has modified his opinion for reasons which cannot properly or fairly support his revised opinion, such as those mentioned in the *White Book* ...' [49]

46 *Jackson v Marley Davenport Ltd* [2004] EWCA Civ 1225.
47 *Wentworth v Lloyd* (1864) 11 ER 1154 and *Sayers v Clarke Walker* [2002] EWCA 910.
48 *Stallwood v David* [2006] EWHC 2600 (QBD, [2007] 1 All ER 206.
49 *Stallwood v David*, note 48, para [21].

The reasons identified in the *White Book* are:

> '… the party's expert had clearly stepped outside his expertise or brief or otherwise had shown himself to be incompetent.'

And even if such a good reason was established, Teare J said:

> '… the court will have to consider whether, having regard to all the circumstances of the case and the overriding objective to deal with cases justly, it can properly be said that further expert evidence is "reasonably required to resolve the proceedings" (CPR 35.1).'[50]

A slightly different approach, though equally restrictive, was taken in *Singh v CJ O'Shea & Co Ltd*.[51] In relation to *Stallwood*, Macduff J took the view that 'there can be no one single principle which is to be given the strength of statute or statutory instrument'.[52] The judge acknowledged that, if an expert changed his opinion, for no good reason or for a bad reason, that might be a matter to feed into the discretion. Any claimed sense of grievance on a party's part that his expert has abandoned him must be judged objectively.

It will therefore generally be necessary to find out why your expert has changed his mind and tell the court. To the judge's obvious surprise, that had not been done in *Stallwood*.

If permission is granted, it will usually be subject to the condition that the first expert's report is disclosed to the other parties:

- In *Beck v Ministry of Defence* the defendants instructed a psychiatrist (Dr A) who had examined the claimant shortly after proceedings were issued.[53] Some months after this, an order was made, by consent, providing for the parties to be able to call one psychiatrist each; the doctors were not named. The defendants lost confidence in Dr A and wished to instruct Dr B; but Dr B then had to examine the claimant. The claimant refused permission. He contended that the defendants could not justify a second examination without showing that they had good reason for changing experts, and that they could not do so, at least whilst they refused to disclose Dr A's report. The Court of Appeal made the order permitting the fresh examination by Dr B conditional on the disclosure of Dr A's report. Simon Brown LJ said:
- 'I do not say that there could never be a case where it would be appropriate to allow a defendant to instruct a fresh expert without being required at any stage to disclose an earlier expert's report. For my part, however, I find it difficult to imagine any circumstances in which that would be properly permissible…'[54]

50 *Stallwood v David*, note 48, para [21].
51 *Singh v CS O'Shea & Co Ltd* [2009] EWHC 1251 (QB), [2009] All ER (D) 230.
52 *Singh v O'Shea*, note 51, para [12].
53 *Beck v Ministry of Defence* [2003] EWCA Civ 1043, [2005] 1 WLR 2206.
54 *Beck v Ministry of Defence*, note 53, para [26]; see also Ward LJ, para [30] and Lord Phillips, paras [33] and [36].

- *Vasiliou v Hajigeorgiou* was a dispute regarding the valuation and profitability of a restaurant.[55] At the Case Management Conference, both parties were given permission to rely on expert evidence. The order did not name the experts. At the time of the CMC, the defendant intended to instruct a particular expert. At a later stage the defendant sought to change experts and obtain a second report. The claimant objected to this, on the basis that the defendant should not have permission to adduce evidence from a further expert. The Court of Appeal accepted that since the original order did not name the expert, the defendant did not require permission from the court to change experts. Instead of leaving matters there, however, the court went on to consider whether, as the defendant submitted, *Beck* was wrongly decided. The defendant submitted that the first report was privileged and that privilege had not been waived. Dyson LJ, giving the judgment of the court, reaffirmed what the court had said in *Beck*: 'Expert shopping is undesirable and, wherever possible, the court will use its powers to prevent it'.[56] He emphasised that, if a party needs the permission of the court to rely on expert witness B in place of expert witness A, the court has the power to give permission on condition that A's report is disclosed to the other party or parties: such a condition will usually be imposed.

We turn now to the position where the desire to change arises as the case commences: the client no longer wishes to use the expert involved during the PAP phase. The Court of Appeal has considered this issue on two occasions in the last ten years, with different outcomes. Both arose out of the PAP for Personal Injury Claims:

In *Carlson v Townsend*, the claimant gave the defendant a list of three orthopaedic surgeons.[57] The defendant objected to one of the three. The claimant instructed one of the remaining two, a Mr Trevett. Having obtained Mr Trevett's report, the claimant declined to disclose it, instead instructing another expert – a Dr Smith, not one of those originally named. Could the claimant be ordered to disclose Mr Trevett's report? The Court of Appeal said no. As later interpreted, the only basis on which the application was made was that Mr Trevett had been jointly instructed, which was rejected. However, there were a number of comments from the judges to the effect that the court could not override the claimant's privilege in Mr Trevett's report.[58]

The Court of Appeal revisited the issue in *Edwards-Tubb v Wetherspoon Plc* in 2011.[59] The claimant fell at work. His case was not medically straightforward. He appeared at first to have hurt his knees, and perhaps his back. But his claim was that the accident caused chronic whole-body pain, which was having a grave effect upon his life. No organic cause could be found. The claimant duly listed three orthopaedic surgeons whom he might

55 *Vasiliou v Hajigeorgiou* [2005] EWCA Civ 236, [2005] 1 WLR 2195.
56 *Vasiliou v Hajigeorgiou*, note 55, para [29].
57 *Carlson v Townsend* [2001] EWCA Civ 511, [2001] 1 WLR 2415.
58 *Carlson v Townsend*, note 57, paras [20] to [22] and [36].
59 *Edwards-Tubb v JD Wetherspoon Plc*: note 3.

instruct. The defendants' insurers did not object to any of the three. It was clear that separate, rather than joint, instructions were contemplated. The claimant's solicitors instructed one of the three, a Mr Jackson. He examined the claimant and provided a report. Proceedings were issued close to the expiry of the limitation period. By then, the defendants had admitted liability. The CPR require the particulars of claim in a personal injury case to attach any medical report relied upon (CPR 16PD.4). These particulars of claim were supported by the report (in fact served shortly beforehand) of a different orthopaedic surgeon, Mr Khan. Mr Khan's report revealed that the claimant had seen 'an orthopaedic surgeon in Bristol for a medico-legal consultation'. That, plus the fact that Mr Khan was not one of the surgeons originally nominated by the claimant's solicitors, alerted the defendants to the fact that Mr Jackson had reported, but for some reason was not being relied on. In due course, the defendants issued an application for the disclosure of the earlier report of Mr Jackson. They conceded that they had no absolute right to this, but argued that it ought to be made a condition of the permission which the claimant needed under CPR 35.4 to rely on Mr Khan's evidence.

The Court of Appeal held that the power to impose a condition of disclosure of an earlier expert report is available where the change of expert occurs pre-issue, as it is when it occurs post-issue. It is a matter of discretion, but it is a power which should usually be exercised where the change comes after the parties have embarked upon the Protocol and thus engaged with each other in the process of the claim. The claimant could therefore rely on Mr Khan's evidence on condition that he disclosed the unused report of Mr Jackson. Where a party has elected to take advice pre-PAP, at his own expense, the same justification did not exist for hedging his privilege, at least in the absence of some unusual factor. At this earlier stage, a party is free to take such advice on the viability of his claim as he wishes. An expert consulted at that time and not instructed to write a report for the court is therefore in a different position.

What do you have to disclose?

The fact that your first, unpopular, expert has only produced a draft report, rather than his final signed report, is probably irrelevant. In *Vasiliou*,[60] Dyson LJ said that the requirement to disclose should not only apply to the first expert's 'final' report, if by that is meant the report signed by the first expert as his or her report for disclosure. It should apply also to the first expert's report containing the substance of his or her opinion. Consequently, in that case a 'draft interim report' had to be disclosed as a condition for changing experts.

It is a moot point, what a 'draft interim report' is. What if you have a conference with the expert in which he makes his views known? Does any attendance note of the expert's views have to be disclosed as a consequence of changing experts? This may well be the subject of further consideration in the future.

60 *Vasiliou*: note 55.

So, looking again at practicalities:

- Make sure you know what your expert's real and informed views are from the outset
- Instruct your expert as an advisory expert only, until you are sure of his real and informed views
- In any court order under CPR 35.4, it may be prudent to identify experts by specialisation, rather than by name, in order to leave open the possibility that the expert can be changed (if necessary) before the final report is served
- If you suspect that your opponents are shopping around for an expert, it may be better to identify experts by name in any court order under CPR 35.4 and to ask your opponents whether they have obtained any reports from experts other than those to be named in such order; and if they have, for confirmation that they will disclose such reports and consider asking the court for such an order
- If the other side seeks permission in effect to change experts, insist that any such permission is on condition that any reports (defined as broadly as you can) from the original expert be disclosed.

Selecting the right expert: the guidance in *BSkyB v HP Enterprise Services* (2010)[61]

The expert who has had problems before

Previous problems in litigation are not necessarily fatal to an appointment as an expert. In *BSkyB v HP Enterprise Services*, Ramsey J said:

> 'With court decisions and other documents now being available in searchable electronic form it is common for those advising parties in litigation to carry out a search for, amongst other things, the names of witnesses and experts to see whether this opens lines of cross-examination. In this case … Robert Worden was an expert in *Pegler v Wang*[62] … Whilst that approach is understandable, it frequently raises more issues than it resolves and creates satellite investigations which are of little benefit in assessing matters in the context of the present case. It is clear that Judge Bowsher rejected Robert Worden's views and approach in a number of respects and in robust terms. That was in the context of a case some nine years ago, with different issues. Doubtless any expert would learn from and take heed of what was said or otherwise would find it difficult to continue to act as an expert. Whilst such criticisms are noted the focus must be on the evidence given in this case.'[63]

61 *BSkyB Ltd v HP Enterprise Services UK Ltd*: note 4.
62 *Pegler Ltd v Wang (UK) Ltd* 70 Con LR 68 (TCC).
63 *BSkyB Ltd v HP Enterprise Services UK Ltd*, note 4, para [278].

The expert who is still in practice, and causation issues

We all know that in professional negligence claims we have to ensure that our proposed expert has time-relevant experience, relevant in the sense that he can give reliable opinion evidence about the standard to be expected at the material time from the reasonably competent professional.

Recent authority has highlighted the need to bear in mind a different factor when looking at causation issues, where opinion evidence is frequently needed.

Henderson, Butler and Oyediran involved three babies, each of whom had been injured whilst in the care of a single adult.[64] As Moses LJ acknowledged, in these cases there remains a temptation to believe that it is always possible to identify the cause of injury to a child. It is also tempting to conclude that the prosecution has proved its case if it identifies a non-accidental injury and the defence can identify no alternative cause. However, he stressed, such a temptation has to be resisted as in this, as in so many fields of medicine, the evidence may be insufficient to exclude, beyond reasonable doubt, an unknown cause.

The Court of Appeal identified a number of factors a trial judge should consider before admitting expert evidence in these cases. The court's reasoning is of general application, and two of the factors should be borne in mind by all of us: (a) is the proposed expert still in practice? and (b) when did he last see a case in his own clinical practice?

As Moses LJ said, giving the judgment of the court:

> 'The fact that an expert is in clinical practice at the time he makes his report is of significance. Clinical practice affords experts the opportunity to maintain and develop their experience. Such experts acquire experience which continues and develops. Their continuing observation, their experience of both the foreseen and unforeseen, the recognised and unrecognised, form a powerful basis for their opinion. Clinicians learn from each case in which they are engaged. Each case makes them think and as their experience develops so does their understanding. Continuing experience gives them the opportunity to adjust previously held opinions, to alter their views. They are best placed to recognise that that which is unknown one day may be acknowledged the next. Such clinical experience … may provide a far more reliable source of evidence than that provided by those who have ceased to practise their expertise in a continuing clinical setting and have retired from such practice. Such experts are, usually, engaged only in reviewing the opinions of others. They have lost the opportunity, day by day, to learn and develop from continuing experience.'[65]

64 *Henderson, Butler and Oyediran*: note 5.

65 *Henderson, Butler and Oyediran*, note 5, para [208].

The need for expert input before alleging negligence: *Pantelli Associates v Corporate City Developments* (2010)[66]

This case deals with the proper practice for pleading professional negligence claims. Pantelli, a firm of quantity surveyors, sued Corporate City Developments (CCD) to recover unpaid fees. CCD served a defence and counterclaim, raising for the first time allegations of professional negligence. CCD agreed, in a consent 'unless' order, to provide proper particulars of its allegations of negligence, causation and loss, by way of an application to amend the defence and counterclaim.

The predictable occurred. CCD produced an entirely new document, a draft amended defence and counterclaim. At the time of drafting the proposed amendments, no expert advice as to whether or how Pantelli had been negligent or in breach of contract was available to the pleader; so all the pleader had done was to take each relevant contract term, adding the words 'failing to' or 'failing adequately or at all to' as a prefix to each obligation, turning each into an allegation of professional negligence. In court, Pantelli said that this did not provide proper particulars, so CCD had failed to comply with the 'unless' order.

Coulson J said this:

> ' ... it is standard practice that, *where an allegation of professional negligence is to be pleaded, that allegation must be supported (in writing) by a relevant professional with the necessary expertise*. That is a matter of common sense: how can it be asserted that act x was something that an ordinary professional would and should not have done, if no professional in the same field had expressed such a view? CPR Part 35 would be unworkable if an allegation of professional negligence did not have, at its root, a statement of expert opinion to that effect.'[67] [*emphasis added*]

He also noted:

> ' ... the Code of Conduct [*of the Bar of England & Wales*] at paragraph 704 prevents a barrister from drafting any document which contains 'any statement or fact or contention which is not supported by the lay client or by his instructions [or] any contention which he does not consider to be properly arguable'. Since an allegation that a professional fell below the standard to be expected of his profession is not a matter which can be supported by a lay client, and since a barrister pleading a case in professional negligence without expert input cannot know whether the allegations are properly arguable or not, I consider that paragraph 704 of the Code is entirely consistent with the usual practice which I have set out ... above.'[68]

66 *Pantelli Associates Ltd v Corporate City Developments Number Two Ltd*: note 6.

67 *Pantelli Associates,* note 6, para [17].

68 *Pantelli Associates,* note 6, para [18]. The Solicitors' Code of Conduct 2007 rule 11.01(3) contains a similar rule; ch 5 of the 2011 Code prescribes similar outcomes.

In the absence of an application for relief against sanctions, Coulson J struck out the allegations of professional negligence and the counterclaim.

Objective unbiased opinion: *Stanley v Rawlinson* (2011)[69]

The expert's duty is to help the court on matters within his own expertise. This duty is paramount and overrides any obligation to the person instructing or paying the expert. Expert evidence should be, and be seen to be, the independent product of the expert uninfluenced by the pressures of litigation. The expert is to provide, 'objective, unbiased opinion on matters within his expertise'.[70] A useful test for independence – from the Civil Justice Council Protocol – is: would the expert express the same opinion if given the same instructions by an opposing party?[71]

As part of that duty, an expert:

- should not assume the role of an advocate
- should consider all material facts, including those which might detract from his opinion
- should make it clear when a question or issue falls outside his expertise; and he is not able to reach a definite opinion, for example because he has insufficient information.

When does the expert cross the line between expert and advocate? The Court of Appeal had to consider this issue in *Stanley v Rawlinson*.[72] Mr and Mrs Stanley sued their neighbours, Mr and Mrs Rawlinson, for £24,500 after an old boundary wall at their home collapsed. The wall was not well maintained, and had for some years had a perceptible lean towards the Stanleys' property. It collapsed during a storm in October 2011. It was common ground that the high winds were the immediate cause of the collapse. The Stanleys argued however that the wall had been made more vulnerable to collapse than it already was because of work in progress on the Rawlinsons' side of the wall. The Rawlinsons disputed causation.

Court costs soon outstripped the value of the claim. (The Stanleys' estimated the legal costs of the action at the permission stage as between £130,000 and £140,000). The matter came to trial at Chelmsford County Court before Judge Moloney, both sides calling expert evidence. The Stanleys relied on a Mr Croucher who apparently raised a new point in oral evidence, namely that the meteorological evidence from a nearby weather station showed that although the wind speed on 6/7 October 2001 had been high, there had been many occasions in the previous few years when it had been a good deal higher; since wind pressure increases with the square of wind speed, why had the wall not fallen before, unless its strength had been reduced by some recent event? The

69 *Stanley v Rawlinson*: note 7.

70 CPR 35 PD2.2.

71 The Protocol for the Instruction of Experts to give Evidence in Civil Claims, para [4.3], reproduced in Volume 1 of Lord Justice Jackson (editor-in-chief), *Civil Procedure ('The White Book')* (London, Sweet & Maxwell, 2011), page 1077.

72 *Stanley v Rawlinson*: note 7.

judge was also shown an email passing between Mr Croucher and Mr Stanley, copied to the Stanleys' solicitors. [We have not been able to find the precise wording of this email reported anywhere.] In the end, the judge found that there had been works in progress at the relevant time, but these works were insubstantial and not of the nature the Stanleys said. These works were not likely to have had any material effect on the wall's ability to resist wind pressure.

In reaching his conclusion, Judge Moloney said this about Mr Croucher:

> 'Mr Croucher's conclusions remained favourable to the Claimants notwithstanding adverse developments in the evidence. Also, I was shown correspondence between him and the Claimants in which he appeared to go beyond the usual role of an expert witness by advising them on the evidence they needed to meet the opposing case; when taxed on this in cross-examination he maintained that he owed a dual duty to the Court and to his "client".'[73]

On appeal, the Stanleys submitted that the judge had been unfair to Mr Croucher; the Court of Appeal agreed. Tomlinson LJ (with whom Baron J and Laws LJ concurred) said that Mr Croucher was quite right when he said that he owed a duty to his client as well as to the court; that was inherent in CPR 35.3. As to Mr Croucher's advice about the evidence needed, the judge said:

> 'Experts are often involved in the investigation and preparation of a case from an early stage. There is nothing inherently objectionable, improper or inappropriate about an expert advising his client on the evidence needed to meet the opposing case, indeed it is often likely to be the professional duty of an expert to proffer just such advice. The opinion of an expert is often if not usually dependent upon the precise nature of a factual situation which he must to some extent assume to have existed. There is nothing improper in pointing out to a client that his case would be improved if certain assumed features of an incident can be shown not in fact to have occurred, or if conversely features assumed to have been absent can in fact be shown to have been present.'[74]

Dealing with joint experts after *Thorpe v Fellowes* (2011)[75]

A single joint expert has an overriding duty to the court. However, he also owes an equal duty to all parties. He should maintain independence, impartiality and transparency at all times. So a single joint expert should not attend any meeting, conference or telephone call which is not a joint one, unless all the parties have agreed in writing or the court has directed that such a meeting may be held and who is to pay the expert's fees for the meeting. It is highly unlikely that the court will ever allow such a meeting if its purpose is to discuss the expert's report.[76] However, the restrictions on one side seeing

73 *Stanley v Rawlinson*, note 7, para [16].
74 *Stanley v Rawlinson*, note 7, para [19].
75 *Thorpe v Fellowes*: note 8.
76 *Peet v Mid-Kent Healthcare NHS Trust* [2001] EWCA Civ 1703, [2002] 1 WLR 210.

joint experts in conference do not apply to speaking to them for logistical reasons. In *Thorpe v Fellowes*,[77] the claimant's solicitors had unnecessarily not taken phone calls from the joint expert, who had been trying to speak to them about the summons and the timing of his appearance at court.

Even where a report from a single joint expert has been ordered, it is possible that the court will permit a party to instruct and then call his or her own expert at trial. Such an order will only be made for 'good reason'.[78] For example if there is secret contact between one side's solicitor and the joint expert, the courts may give permission to the other side to call their own expert evidence.[79] But the mere fact that one or other party disagrees with the joint expert's conclusion is not a sufficient reason.[80]

The appointment of a single joint expert does not prevent a party from instructing its own expert to advise behind the scenes. However, the costs of such an expert may not be recoverable.[81]

Expert evidence: what does the judge want? *Compania Sud Americana de Vapores v Sinochem Tianjin Import and Export* (2009)[82]

Appendix 3 to the judgment of Christopher Clarke J in this case gives a useful judicial wish-list. In the case itself, permission was given for three experts for each party. A sequence of exchange of reports was laid down, with short supplemental reports to follow. But, in the end, 14 reports were produced from more than three experts. No application was made to court for permission to adduce these additional reports, the need for some of which arose after the order in respect of experts was made. Two days reading time was made available. In that time the judge read:

- 13 of the 15 separate items suggested, including the skeleton arguments (totalling 128 pages)
- The arbitration award (60 pages)
- Nine witness statements (three files)
- The cross-examination of the chief engineer
- Two of the experts' reports.

Understandably, he described the idea that it would have been possible in two days to read and digest the totality of the 14 experts' reports, contained in eight lever arch files (obviously the product of hours of labour), as well as the

77 *Thorpe v Fellowes*: note 8.
78 *Peet*, note 76, para [28].
79 *Edwards v Bruce & Hyslop (Brucast) Ltd* [2009] EWHC 2970 (QB).
80 *Thorpe*, note 8, para [56].
81 The Protocol for the Instruction of Experts to give Evidence in Civil Claims, note 71, para [17.5].
82 *Compania Sud Americana v Sinochem Tianjin*: note 9.

other material, as 'fanciful'.[83] Having heard the factual evidence, he adjourned the case and spent about four further days reading the material.

In his opinion, that was a striking example of a not uncommon phenomenon, and offered some remedies:

- *Don't forget the learning curve*. The lawyers engaged in the case for years will have been consulted about, or seen, the expert evidence as it develops. They then innocently but grossly underestimate the time needed for anyone starting from a blank sheet to read and assimilate the material.
- *Consider a preliminary tutorial*: this is contemplated by paragraph 159(j) of the Commercial Court's Long Trials Working Party Report (2007): the judge may require the advocates or the experts (with only a small team in attendance in order to save costs) to come to court at one or more points in the pre-reading in order that the judge may ask questions or seek other assistance, such as a 'teach–in' on expert issues.
- *Produce a realistic reading-time estimate*. Bear mind it is an estimate of how long it will take a judge, who has no familiarity with the underlying material, to get on top of it. If it becomes apparent that the estimate is too short, the court should be informed, even if recognition of that inadequacy dawns late in the day.
- *Make the task of assimilating the material shorter and easier*. Check whether it is clear what message is to be derived from, or proposition supported, by the data in the experts' reports. Christopher Clarke J said he was faced with: 'A large number of figures …, some looking much the same as others, and some baffling to the eye … In respect of some of them it was not clear what the lines represented, there being a large number of lines in indistinguishable colours on too small a scale.'[84]

The future – hot-tubbing

International arbitrators have developed a technique called 'expert conferencing', or 'hot-tubbing'. (It is also, less sensationally, known as 'concurrent expert evidence'.) Usually the process is as follows:

- The parties present their written expert reports
- The experts are required to meet in advance of the hearing to draw up lists of matters on which they agree, and matters on which they do not agree
- Based on the second of the two lists above, the arbitral tribunal prepares an agenda and presents it to the parties and their advocates in advance of the hearing

83 *Compania Sud Americana v Sinochem Tianjin*, note 9, Appendix 3, para 3.
84 *Compania Sud Americana v Sinochem Tianjin*, note 9, Appendix 3, para 8.

- After all the fact witnesses from both sides have been heard, all the experts sit on a table alongside each other and the arbitral tribunal takes the experts through a pre-prepared agenda.

The perceived benefit is said to be that:

> '… [a] transcript of such a debate is more helpful to the arbitral tribunal than the transcript of a traditional 'sparring match' cross-examination between one side's expert and the other side's cross examining advocate.'[85]

Pilot schemes in court

Jackson LJ in his final report on Civil Litigation Costs suggested that this approach should be piloted in court cases, with the experts', parties' and judge's agreement.[86] To date, a pilot scheme along these lines has been introduced in Manchester, in the TCC in London and Mercantile Court, and now also in Bristol.

Amendments have also been made to the *TCC Guide* to suggest this as a form of trial presentation.[87] The court's guidelines indicate that the parties and court will consider whether a Concurrent Expert Evidence Direction (CEED) should be given at the Case Management Conference. In considering whether or not to make a CEED, the following factors are of particular relevance:

- The number, nature and complexity of the issues which are or will be the subject of expert evidence ('expert issues'); there is, however, no presumption that a CEED is appropriate only where the expert issues are complex or unusual;
- The importance of the expert issues to the case as a whole; there is, however, no presumption that a CEED is appropriate only where the expert issues are of central importance;
- The number of experts, their areas of expertise and their respective levels of expertise;
- The extent to which use of the concurrent evidence procedure is likely to assist in clarifying or understanding the expert issues, or any of them; and/or save time and/or costs at the hearing;
- Whether there is any serious issue as to the general credibility or independence of one of the experts; if there is, a CEED is unlikely to be suitable.

If a CEED is made pre-trial, the usual direction for a meeting of experts and the provision of a joint statement will be made. In addition:

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85 *Redfern and Hunter on International Arbitration* (5th ed, OUP, Oxford, 2009), para [6224].

86 Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009), ch 38, para 3.23; downloadable from www.judiciary.gov.uk/about_judiciary/cost-review.

87 The *TCC Guide* (2nd edition 2005, 2nd rev 2010) para 13.8.2, downloadable from www.justice.gov.uk/guidance/courts-and-tribunals/courts/technology-and-construction-court/index.htm.

- The joint statement must identify each area of disagreement, clearly and separately by reference to a heading and number. Each expert's position in respect of such an area should be set out, together with their reasons. If the expert is relying on reasons given in the report already served, a clear cross-reference to the relevant part should be sufficient. The aim is to allow the judge to understand the issues fully to enable him to chair the discussion.
- An agreed agenda of issues for expert evidence has to be established before the trial, if possible by the pre-trial review. The judge may re-order, revise or supplement it and it is to be made available to the experts before they give their evidence.

At the trial:

- The experts are called to give evidence at the same time from the witness table
- The judge will identify to the experts any significant factual matters or issues which have arisen in the trial thus far and which may affect their evidence
- Subject to any further direction, the experts will address the issues in the order in which they appear in the agenda
- In relation to each issue to be addressed:
    - The judge will initiate the discussion by asking the experts, in turn, for their views
    - Once an expert has expressed a view, the judge may ask questions about it
    - At one or more appropriate stages when questioning a particular expert, the judge will invite the other expert to comment or to ask his own questions of the first expert
    - After the process set out above has been completed for all the experts, the parties' representatives will be permitted to ask questions of them; while such questioning may be designed to test the correctness of an expert's given view, or seek clarification of it, it should not cover ground which has been fully explored already
    - In general, a full cross-examination or re-examination is neither necessary nor appropriate
- After this process has been completed, the judge may seek to summarise the experts' different positions on the issues, as they then are, and ask them to confirm or correct that summary.

The parties should agree in advance that a transcript of the expert evidence be obtained and provided to the judge, in all but the simplest of cases.

The pilots are being monitored, but the results will not be available until next year. One suspects that the pilot scheme may have been extended to Bristol as there has been insufficient enthusiasm for it in Manchester.

The *TCC Guide* suggests that:

1. The experts will be cross-examined on general matters and key issues before they are invited to give evidence concurrently on particular issues;
2. The process is most useful where there are a large number of items to be dealt with and the procedure allows the court to have the evidence on each item dealt with on the same occasion; this frequently allows the extent of agreement and reason for disagreement to be seen more clearly; and
3. The parties may consent to the giving of concurrent evidence and the judge will consider whether, in the absence of consent, any particular method of concurrent evidence is appropriate in the light of the provisions of the CPR.[88]

What are the risks?

The first risk is loss of control – will your expert lose concentration/fear if put in the hot tub rather than cross-examined, and therefore make concessions he would not otherwise make?

The second is loss of rigour – without cross-examination, will all the right questions be asked and the right documents put to the witnesses?

Thirdly, tilting the process – will it favour the confident, assertive and persuasive expert, and the expert who has given evidence in the hot tub before?

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88 The *TCC Guide*: note 87.

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is to promote the study and understanding of
construction law amongst all those involved
in the construction industry'

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