

AUSTRALIAN EXPERIENCE OF CONCURRENT EXPERT EVIDENCE

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In recent years I have participated in a number of conferences with the judiciary of developing countries in the Asia Pacific region. Many of these communities are relatively poor and lack capital to fund the physical facilities which we accept as necessary for an effective judiciary. Some countries, although having been colonised by more developed countries, lack a legal tradition which ensures the acceptance by the communities of the role of the courts as the arbiters of disputes. In some there may be tensions between the judiciary and the executive. In many places the development of customary laws must be reconciled with a legal system inherited from colonial times.

I recently attended a conference in Tonga where the Chief Justice of Samoa spoke of the development of customary law. As I listened to him I was reminded of the early days of equity as the judges struggled to develop principles which would provide a just solution to a problem while ameliorating the perceived harshness of the common law. Every exchange I have with judicial colleagues of the Asia Pacific region reminds me that the law is not static. Society is in constant change. Legal systems

respond to those changes. The response is often reserved and comes when the demand for change is expressed by many in the community. In many cases the need for change is only apparent when a retrospective assessment confirms that what may have been first thought to be an irritant or inconsequential has become an entrenched problem. Sometimes it is the courts which respond by changing their procedures, adapting and altering the rules by which litigation is conducted. Other times when the problem develops a “political” dimension the legislature intervenes. When this occurs the changes are likely to be abrupt. Parliaments rarely intervene to merely refine systems a task which can be accomplished by the courts. They are more likely to intervene to impose radical change.

In earlier days when issues requiring the assistance of experts were involved courts used their own experts, sometimes referred to as assessors, and expert jurors who, of course, were independent of the parties. Expert juries were frequently empanelled in urban areas and in matters involving practices or customs of a particular trade. In trade disputes, the use of “juries of men of that trade” was not only known, but was common in the City of London throughout the 14th century.¹ For a time commercial cases under the influence of Lord Mansfield, who was the Lord Chief Justice during the 18th century (1756-1788), merchant juries were used for their knowledge and professional experience in mercantile affairs as a “permanent liaison between law and commerce.”²

There is no comprehensive history of court experts. However, records as far back as 1299, record that physicians and surgeons in London were called to advise the court

¹ “Expert Witnesses”, NSWLRC Report 100 [2.4]

² C Jones, “Expert Witnesses”, Clarendon OUP, 1994, pp 25-26; NSWLRC Report [2.5]; T Golan, “Laws of Nature and Laws of Men”, Harvard University Press, 2004, p 21

on the medical value of the flesh of wolves.³ During the 14th century, surgeons were asked by the court to provide an assessment of wounds in medical malpractice cases. In the 17th century, cases involving witchcraft utilised the assistance of physicians as court experts who applied their learning in the midst of “misapprehensions over natural phenomena and attributed some of these to Satan’s attempts to mislead the human race.”⁴ There are records from the early 18th century of court experts assisting in the proper construction to be placed on the wording of business and commercial papers, where a specialised meaning was appropriate.⁵

Experts as specialist advisers to judges were commonly utilised in the Admiralty courts. At times they were referred to with the judge as a “fellow adjudicator.”⁶ In the 16th century, judges of the Admiralty courts were often assisted by 2 elder brethren of the Corporation of Trinity House which was an association of seamen.

Court experts and assessors were in reality a form of expert jury. They were free from the restraints of judicial control, could not be cross examined and their advice was often given in private and not required to be disclosed to the parties. Today the New South Wales Land and Environment Court utilises a similar structure in some merit appeals.

By the late 18th century and early 19th century, the adversary system was maturing and judges and practitioners were asserting its accepted principles with confidence. The judge was confined to the role of umpire and in many areas the expert had been

³ T Golan, “Laws of Nature and Laws of Men”, Harvard University Press, 2004, p 20

⁴ C Jones, “Expert Witnesses”, Clarendon OUP, 1994, pp 36-37

⁵ C Jones, “Expert Witnesses”, Clarendon OUP, 1994, p 36

⁶ “Expert Witnesses”, NSWLRC Report 100 [2.10]-[2.16]; T Golan, “Laws of Nature and Laws of Men”, Harvard University Press, 2004, pp 20-21

removed from the judge's right hand. A perception had developed that judges were too dependent upon the advice of assessors or court experts and were not making their own decisions. There were concerns that the court expert, assessor, was no longer subsidiary and the judiciary had lost its primary role as a decision-maker.⁷

These concerns were resolved by the increasing use of expert witnesses called by the parties to the proceedings. Described as "special" witnesses, their evidence was received as an exception to the common law rule forbidding opinion evidence. The expert witness has been described as a "freak in the new adversarial world, an incompatible and inharmonious, yet indispensable and influential figure in the modern adversarial courtroom."⁸

By the time of *Folkes v Chadd*⁹ (a case where experts explain how a port went to decay), direct judicial involvement in the litigation process had diminished. Each party had the right to argue their case and produce their own evidence. Partisan expert testimony was accepted.¹⁰ Cases involving expert witnesses ranged from textile trade to tax litigation and nuisance cases. The problem then, as is familiar to us today, was whether lay jurors could receive reliable expert guidance from expert witnesses summoned by a party. The response was that the "adversarial apparatus" together with "men of science" who adhered to the gentlemanly code of honour would ensure a just outcome.¹¹

⁷ C Jones, "Expert Witnesses", Clarendon OUP, 1994, p 41

⁸ T Golan, "Laws of Nature and Laws of Men", Harvard University Press, 2004, p 7

⁹ (1782) 99 ER 58. This case is also known as the "Wells Harbour" case, which was decided by Lord Mansfield

¹⁰ T Golan, "Laws of Nature and Laws of Men", Harvard University Press, 2004, pp 35-36

¹¹ T Golan, "Laws of Nature and Laws of Men", Harvard University Press, 2004, pp 49-50

The industrial revolution brought many changes. Its impact upon the law was significant. Many disputes now involved the consequences of industrial pollution, nuisance and the damage occasioned by accidents from machinery of various kinds. The world of patent law developed apace with the creation of new inventions and products. The expert became an essential witness in many cases. And the number of cases increased significantly. Unlike expert juries and assessors the expert witness did not enjoy independence from a party and did not have an independent role in the decision-making process. Commentators became sceptical of their honesty and the integrity of the opinions they expressed in court. Disillusionment with scientific evidence was expressed in the *Chemical News* of 1860.

“The Palmer case¹², the Turbane Hill mineral case, the Smethurst case,¹³ are instances in which scientific men have been led to exhibit science to the world as utterly unworthy of reliance in such cases. The public had been taught to believe that in judicial investigations the chemists and the microscopists would be able to place the truth before the court in such a manner as to secure justice, and it was a terrible blow to find that the professors were at variance among themselves as to the truth... At present, it must be confessed, neither the judge, nor the public, have any confidence in the scientific evidence in cases of poisoning.”¹⁴

In his book “Laws of Men and Laws of Nature” Dr Tal Golan speaks of early disquiet about expert evidence:

“Discontent with scientific expertise in Common Law courts has existed as long as there has been scientific expert witnesses, and by the mid 19th century, the debate over the meaning of these conflicts and the ways to resolve them had all the features that today are blithely assumed to be new ... If anything it may suggest that current conflicts are more deeply ingrained and ... reveal that these conflicts are less a product of human and institutional pathology than they are an illustration ... of the complexity of the ongoing

¹² This case involved strychnine poisoning.

¹³ This case involved arsenic poisoning.

¹⁴ T Golan, “Laws of Nature and Laws of Men”, Harvard University Press, 2004, p 104

social negotiations needed to harmonise laws of men and laws of nature and to cut truth and justice to human measure.”¹⁵

Our legal system has undergone significant change during the 20th century. Although trial by jury is still utilised for serious crime, more than 90% of criminal trials are disposed of without a jury. In a civil context trial by jury has all but disappeared. It is maintained in defamation where an expression of community values through lay jurors is believed to be significant. Otherwise at least in New South Wales a civil jury trial is a rarity.

In the latter part of the 20th century a number of aspects of the adversarial system of justice have been questioned. Two forces are at work. As the standard of living in the community has risen the unit cost of labour for any task has also risen. This is as true of litigation as it is of manufacturing or agriculture. The consequence has been an increasing demand for efficiency of process to ensure that the cost of the ultimate product remains affordable. Although the price of a refrigerator, motor car, or bottle of wine has in real terms reduced over the last 30 years the same is not true of our system of justice. The result as Sir Anthony Mason commented has been an “erosion of faith”¹⁶ in the adversarial system. In a paper titled “The Future of Adversarial Justice”, Sir Anthony commented: “The rigidities and complexity accorded litigation, the length of time it takes and the expense (both to government and the parties) has long been the subject of critical notice.”¹⁷

¹⁵ T Golan, “Laws of Nature and Laws of Men”, Harvard University Press, 2004, p 4

¹⁶ Sir Anthony Mason, “The Future of Adversarial Justice”, a paper given at the 17th AIJA annual conference on 6-8 August 1999

¹⁷ Sir Anthony Mason, “The Future of Adversarial Justice”, a paper given at the 17th AIJA annual conference on 6-8 August 1999

The adversary system in its ultimate manifestation was once accepted as providing the most effective means of resolving a dispute. When the community was less concerned with the time and cost of the judicial process and in any event those costs were less onerous, most people accepted that its benefits outweighed any detriments. The primacy of individual autonomy which it acknowledged could be afforded. This is no longer the case. The adversary system has already been modified in many areas. Gleeson CJ has recently said of the system in relation to criminal trials:

“One of its weaknesses is that it assumes a reasonable balance of power (sometimes called equality of arms) between the opposing parties. A gross imbalance can defeat the system, and there are circumstances (of which the most obvious is a criminal trial of an unrepresented accused) where the judge is obliged to play an active role in order to redress the imbalance.”¹⁸

In almost every common law jurisdiction in the last 30 years a detailed and critical examination of the civil justice processes has been undertaken. Although other issues have been addressed and responses developed, case management by the Court is now universal, expert evidence has been and remains a critical issue.

Apart from the cost of litigation the quality of judicial decision-making has been called into question when the evidence of experts, particularly with respect to medical issues is involved. The judges are not the subject of the criticism. The concern is with the integrity of the evidence upon which they are required to adjudicate.¹⁹ The abolition of the jury as the decision-maker means that there is now a reasoned judgment from a judicial officer. Those reasons will disclose the impact upon the

¹⁸ “Some legal scenery”, 5 October 2007, http://www.hcourt.gov.au/speeches/cj/cj_5oct07.pdf, pp 10-11

¹⁹ M Nothling, “Expert Medical Evidence: The Australian Medical Association’s Position”, available from: <http://www.aija.org.au/info/expert/Nothling.pdf>, viewed 28 June 2006, p 1

judge of the evidence of individuals, including the experts, and the part their evidence has played in the resolution of the problem. It provides a capacity in the parties and others to judge whether the judge's reasoning is sound and assess whether the judge has misunderstood or been misled by the evidence. Those with special knowledge of areas of learning critical to the decision are able to assess whether "the science" applied by the judge is consistent with that accepted by leaders in the particular field. If the judge has got it wrong members of the profession can identify the error. Any error has the potential to erode confidence in the judicial process. Repeated errors may lead to considerable disquiet.

Both because of the cost to the parties of the receipt and scrutiny of expert evidence and because of questions about its integrity many commentators have expressed concern about whether our conventional approach to it is acceptable. The concerns are almost universal. The responses are still developing.

There is a critical need for the courts to continue to address these problems. As experience in many jurisdictions indicates, where the courts are unable to modify their practices to meet the community's expectations in the resolution of particular disputes the legislature will act. That action may go beyond modification of an existing system and, as in the case of workers' compensation in NSW, result in the abolition of a court as the decision-making body. The significant reform of the Motor Accident and Personal Injury laws in NSW is in part a reaction to the perceived inadequacies of the court system for the resolution of disputes.

There is no reason why the response of the Parliament to problems in the resolution of these disputes could not be repeated in other areas of litigation. Claims in professional negligence could be resolved in expert tribunals. Universal 'no fault' accident compensation schemes could, as occurred in New Zealand be devised. If the courts are to maintain their present role in resolving the community's disputes it is critical that together with the practising profession procedures are devised which, so far as possible, ensure efficiencies in process and integrity in decision-making.

EXPERT EVIDENCE IN NSW

Since December 2006, the *Uniform Civil Procedure Rules* ('UCPR') and Practice Directions for the Common Law Division of the Supreme Court of New South Wales have made a number of number changes to the way expert evidence is dealt with in civil litigation. The aim of the changes has been to encourage the integrity and reliability of expert evidence. The "overriding purpose" in the *Civil Procedure Act* 2005 confirms the necessity for the courts to control, where possible, the litigation so that the "cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute".²⁰

Changes to the expert evidence regime include: (1) single experts appointed by agreement between the parties in addition to the existing option of court-appointed experts and (2) powers in the courts to control the number of experts and the manner of the giving of their evidence. The changes reflect the conclusion of the NSW Law Reform Commission in 2005 in its report "Expert Witnesses."

²⁰ *Civil Procedure Act* 2005 (NSW) ss 56-60

Court-controlled use of expert evidence

Although the permission rule (as it is known in the United Kingdom) in complete form was not adopted, the amendments made to the UCPR provide for significantly greater control of expert evidence by the courts. The amended rules allow the courts to confine the number of experts called and to refuse to allow an expert to give evidence on particular issues.

Rule 31.17 provides a comprehensive statement of the main purposes of Division 2 of Part 31, which relates to expert evidence. They must be understood in light of the overriding purpose of the *Civil Procedure Act 2005* (CPA) and UCPR provided in s 56, being the “just quick and cheap resolution of the real issues in the proceedings.”

Rule 31.17 states the main purposes as follows:

- (a) to ensure that the court has control over the giving of expert evidence;
- (b) to restrict expert evidence in proceedings to that which is reasonably required to resolve the proceedings;
- (c) to avoid unnecessary costs associated with parties to proceedings retaining different experts;
- (d) if it is practicable to do so without compromising the interests of justice, to enable expert evidence to be given on an issue in proceedings by a single expert engaged by the parties or appointed by the court;
- (e) if it is necessary to do so to ensure a fair trial of proceedings, to allow for more than one expert (but no more than are necessary) to give evidence on an issue in the proceedings;
- (f) to declare the duty of an expert witness in relation to the court and the parties to proceedings.

The change is immediately apparent in Rule 31.19 which provides that if parties intend to adduce, or if it becomes apparent that they may adduce expert evidence at trial, they must first seek directions from the Court. The rule clearly states that in the absence of directions expert evidence may not be adduced at the trial, unless the

court orders otherwise. Rule 31.20 contains a wide-ranging list of directions, which the court may consider giving. Both rules endow the Court with extensive control over the use of expert evidence at any trial.

Examples of the kind of direction for which Rule 31.20 provides include a direction:

- that expert evidence may or may not be adduced on a specified issue;
- limiting the number of expert witnesses who may be called to give evidence on a specified issue;
- providing for the engagement and instruction of a parties' single expert or a court-appointed expert in relation to a specified issue;
- requiring experts in relation to the same issue to confer, either before or after preparing experts' reports in relation to a specified issue.

Control of litigation by courts is as important as maintaining flexibility. A "regime as to expert evidence that permits maximum possible flexibility"²¹ serves to accommodate different requirements and practices in different courts for different kinds of subject matter of varying degrees of complexity and importance. Unlike the UK, NSW courts have "strengthened case management powers enormously"²² via the CPA and UCPR making a "permission rule" unnecessary. Instead of displacing the adversary system altogether, case management allows for the courts to take a greater interest in what occurs and discipline "responsibility and prerogative of the parties"²³ to procure the evidence they wish to adduce. A developed framework of case management, within which the giving of expert evidence is controlled allows flexibility

²¹ Report of the Attorney General's Working Party on Civil Procedure ('WP Report') [4]

²² WP Report [7]

²³ WP Report [10]

and a capacity to fit the desire of the parties to the interests of justice in an individual case.²⁴

Single experts

The use of single joint experts in the UK following the Woolf Reforms²⁵ has been controversial. They have been described as “arguably the most significant and controversial recommendation of Lord Woolf’s Report concerning expert evidence.”²⁶

Single experts, agreed by the parties and appointed by the Court have been extensively used in the New South Wales Land and Environment Court for more than four years.

In relation to joint expert witnesses called by the parties, the NSWLRC Report said:

“The primary objective of the appointment of a joint expert witness is to assist the court in reaching just decisions by promoting unbiased and representative expert opinion. Another important objective is to minimise costs and delay to the parties and to the court by limiting the volume of expert evidence that would otherwise be presented.”²⁷

UCPR Part 31 Div 2 Subdiv 4 (Rules 31.37 – 31.45) provides for parties’ single experts. The Court may order at any stage of proceedings that an expert be engaged jointly by the parties.²⁸ A “parties’ single expert”, is engaged and selected by agreement of the parties.²⁹ The parties take the initiative. The selection of the expert

²⁴ WP Report [11]

²⁵ “Access to Justice: Final Report to the Chancellor on the Civil Justice System in England and Wales”, July 1996

²⁶ “Expert Witnesses”, NSWLRC Report 100 [4.16]

²⁷ “Expert Witnesses”, NSWLRC Report 100 [7.6], [7.7]

²⁸ UCPR r 31.37(1)

²⁹ UCPR r 31.37(2)

by the parties is integral to the concept of the joint expert witness.³⁰ Of this change the NSWLRC Report said:

“The Commission believes that the use of joint expert witnesses can reduce the partisanship that is today so closely associated with expert witnesses called by each party, and encourage the use of experts with balanced, representative, views. Similarly, the use of joint expert witnesses has the potential, in many cases, to reduce the public and private costs and the delays associated with civil litigation. For these reasons, adding the possibility of a joint expert witness to the array of options available to the court is likely to facilitate the just, quick and cheap resolution of the real issues in the proceedings.”³¹

The amended rules also preserve the role of the “court-appointed expert” who is the court’s witness and different from the “parties’ single expert”.

Where a parties’ single expert has been called in relation to an issue, Rule 31.44 prohibits the parties from adducing further expert evidence on that issue, unless by leave of the Court. Rule 31.52 provides a similar control in respect of the evidence of a court-appointed expert in relation to an issue. The rules provide a presumption in favour of one expert per issue.

Single joint experts may be desirable where the issue is relatively uncontroversial or the subject matter is not so contentious that it presents conflicting theories or schools of thought. The English Court of Appeal in *Casey v Cartwright* [2007] 2 All ER 78, which was a case of damages for personal injury in a low velocity road traffic claim, recently discussed the use of a single expert witness. The Court commented on the exercise of discretion to determine whether expert evidence should be allowed by reference to the overriding principle that litigation must be concluded without delay,

³⁰ “Expert Witnesses”, NSWLRC Report 100 [7.57]

³¹ “Expert Witnesses”, NSWLRC Report 100 [7.33]

keeping an appropriate relationship between the cost of the litigation and the amount of damages sought. Dyson LJ (with whom Keene and Hallett LJJ) said:³²

“We should say something about single joint experts. They have an invaluable role to play in litigation generally, especially in low value litigation. But we accept ... that, at any rate until some test cases have been decided at High Court level, judges should be slow to direct that expert evidence on the causation issue be given by a single joint expert. This is because the causation issue is controversial.”

UPCR Rule 31.35(c) – (h) provides for the use of the process of concurrent evidence.

This is the process in which, if there are more than one, the experts give their evidence to the court together.

The NSWLRC endorsed the procedure and identified a number of benefits:

- Where there are more than two relevant experts, the process can save time, minimising time on preliminaries and allowing the key points to be quickly identified and discussed.³³
- The process moves somewhat away from lawyers interrogating experts towards a structured professional discussion between peers in the relevant field.³⁴
- Experts typically make more concessions, and state matters more frankly and reasonably, than they might have done under the traditional type of cross-examination.³⁵
- The questions may tend to be more constructive and helpful than the sort of questions sometimes encountered in traditional cross-examination.³⁶
- The taking of expert evidence concurrently will no doubt be more successful in some situations than in others; in the case of some judges

³² *Casey v Cartwright* [2007] 2 All ER 78 at 87 [36]

³³ “Expert Witnesses”, NSWLRC Report 100 [6.56]

³⁴ “Expert Witnesses”, NSWLRC Report 100 [6.56]

³⁵ “Expert Witnesses”, NSWLRC Report 100 [6.56]

³⁶ “Expert Witnesses”, NSWLRC Report 100 [6.56]

and some types of cases, concurrent taking of evidence is very successful.³⁷

- Concurrent evidence has considerable potential to increase the likelihood of the court achieving a just decision.³⁸

Rule 31.35 permits a number of possible procedures:

- experts to be sworn immediately after another;
- experts may give their opinion(s) about the opinion(s) of another expert witness or ask questions to each other;
- cross-examination and/or re-examination of all the expert witnesses seriatim on each issue relevant to one matter at a time.

CONCURRENT EVIDENCE

One of the most significant reforms in the civil trial process in Australia has been the concurrent method of receiving expert evidence. Concurrent evidence was pioneered in Australia³⁹ and is utilised by various Australian courts and tribunals, including the Common Law Division of the New South Wales Supreme Court, the New South Wales Land and Environment Court, the Queensland Land and Resource Tribunal, the Federal Court of Australia and the Administrative Appeals Tribunal. It has also been used in three murder trials in New South Wales where the judge was sitting without a jury.

A Practice Note makes particular provision for concurrent evidence in the New South Wales Supreme Court. It reads as follows:

³⁷ "Expert Witnesses", NSWLRC Report 100 [6.57]

³⁸ "Expert Witnesses", NSWLRC Report 100 [6.59]

³⁹ I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy*, 4th ed (2009) Lawbook Co at 489

“All expert evidence will be given concurrently unless there is a single expert appointed or the Court grants leave for expert evidence to be given in an alternate manner.”⁴⁰

Provision has also been made in *Uniform Civil Procedure Rules 2005 (NSW)* to facilitate concurrent evidence. The relevant Rule is r 31.35 which is extracted in Appendix A.

How does it work? Although variations may be made to meet the needs of a particular case, concurrent evidence requires the experts retained by the parties to prepare a written report in the conventional fashion. The reports are exchanged and, as is now the case in many Australian courts, the experts are required to meet without the parties or their representatives to discuss those reports. This may be done in person or by telephone. The experts are required to prepare a short point document incorporating a summary of the matters upon which they are agreed, but, more significantly, matters upon which they disagree. The experts are sworn together and, using the summary of matters upon which they disagree, the judge settles an agenda with counsel for a “directed” discussion, chaired by the judge, of the issues the subject of disagreement. The process provides an opportunity for each expert to place his or her view before the court on a particular issue or sub-issue. The experts are encouraged to ask and answer questions of each other. Counsel may also ask questions during the course of the discussion to ensure that an expert’s opinion is fully articulated and tested against a contrary opinion. At the end of the process the judge will ask a general question to ensure that all of the experts have had the opportunity of fully explaining their position.

⁴⁰ Supreme Court of New South Wales, *Practice Note SC CL 5*

I have utilised the process of concurrent evidence on many occasions, both when I was in the Land and Environment Court, and in the Supreme Court. In 2006 I sat as the trial judge in relation to a claim by a young lad who was aged 18 at the time he had a cardiac arrest and suffered catastrophic and permanent brain damage. He sued his general practitioner. The issues required evidence from other general practitioners about the duty of a doctor given the plaintiff's circumstances. There was also a major cardiological issue.

As it happened, the parties called a total of five general practitioners. They gave evidence concurrently. They sat at the bar table together and in one and a half days discussed in a structured and cooperative manner the issues which fell within their expertise. They had previously conferenced together for some hours and prepared a joint report which was tendered. In all likelihood if their evidence had been received in the conventional manner it would have taken at least five days. I would not have had the benefit of the questions which they asked each other, and, of even greater value, the responses to those questions.

Four cardiologists also gave evidence together – one by satellite from the USA, the others sitting at the bar table in the courtroom. Their evidence took one day. The doctors were effectively able to distil the cardiac issue to one question which was identified by them and although they held different views, their respective positions on the question were clearly stated. The reports to me indicate that the process was welcomed by the cardiologists and the parties' advocates.

I have been a lawyer for in excess of 35 years. That day in court was the most significant I have experienced. It was a privilege to be present and chair the discussion between four doctors – all with the highest level of expertise, discussing the issues in an endeavour to assist me to resolve the ultimate question.

Concurrent evidence is the means by which we can provide in the courtroom the decision-making process which professional people conventionally adopt. If one of us suffered a traumatic injury which required hospitalisation and the possibility of major surgery to save our life, a team of doctors would come together to make the decision whether or not to operate. There would be a surgeon, anaesthetist, physician, maybe a cardiologist, neurologist or one of the many specialities which might have a professional understanding of our problems. They would meet, discuss the situation and the senior person would ultimately decide whether the operation should take place. It would be a discussion in which everyone's views were put forward, analysed and debated. The hospital would not set up a court case. If this is the conventional decision-making process of professional people, why should it not also be the method adopted in the courtroom?

Experience shows that provided everyone understands the process at the outset, in particular that it is to be a structured discussion designed to inform the judge and not an argument between the experts and the advocates, there is no difficulty in managing the hearing. Although I do not encourage it, very often the experts, who will be sitting next to each other, end up using first names. Within a short time of the discussion commencing, you can feel the release of the tension, which infects the

conventional evidence gathering process. Those who might normally be shy or diffident are able to relax and contribute fully to the discussion.

I have had the opportunity of speaking with many witnesses who have been involved in the concurrent process and with counsel who have appeared in cases where it has been utilised. Although, generally because of inexperience, counsel may be hesitant before being involved I have heard little criticism once they have experienced the process. The change in procedure has been met with overwhelming support from the experts and their professional organisations. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively convey their own views and respond to those of the other expert or experts. Because they must answer to a professional colleague rather than an opposing advocate, they readily confess that their evidence is more carefully considered. They also believe that there is less risk that their evidence will be unfairly distorted by the advocate's skill. The process is significantly more efficient than conventional methods. Evidence which may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as 20 per cent of the time which would otherwise have been required.

I have had cases where eight witnesses gave evidence at the one time. I know of one case where there were 12. There have been many cases where four experts have given evidence together. As far as the decision-maker is concerned, my experience is that because of the opportunity to observe the experts in conversation with each other about the matter, together with the ability to ask and answer each

others' questions, the capacity of the judge to decide which expert to accept is greatly enhanced. Rather than have a person's expertise translated or coloured by the skill of the advocate, and as we know the impact of the advocate is sometimes significant, you have the expert's views expressed in his or her own words. There are also benefits when it comes to writing a judgment. The judge has a transcript where each witness answers exactly the same question at the same point in the proceedings.

I am often asked whether concurrent evidence favours the more loquacious and disadvantages the less articulate witnesses. In my experience, this does not occur. Since each expert must answer to their professional colleagues in their presence, the opportunity for diversion of attention from the intellectual content of the response is diminished. Being relieved of the necessity to respond to an advocate, which many experts see as a contest from which they must emerge victorious, rather than a forum within which to put forward their reasoned views, the less experienced, or perhaps shy person, becomes a far more competent witness in the concurrent evidence process. In my experience, the shy witness is much more likely to be overborne by the skilful advocate in the conventional evidence gathering procedure than by a professional colleague with whom, under the scrutiny of the courtroom, they must maintain the debate at an appropriate intellectual level. Although I have only rarely found it necessary, the opportunity is, of course, available for the judge to intervene and ensure each witness has a proper opportunity to express his or her opinion.

Concurrent evidence is essentially a discussion chaired by the judge in which the various experts, the parties, the 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 public.

THE PHASED TRIAL

In the Common Law Division of the New South Wales Supreme Court we have taken a further significant step in the evolution of the trial process.

A consequence of using concurrent expert evidence is the need to reconsider the conventional structure of a civil trial. The traditional process requires the plaintiff to present its complete case, both lay and expert evidence, and “close its case” before the defence presents its lay and expert evidence. This sequence favours the defence. It provides the opportunity for the defence to “ambush” the plaintiff. Once the plaintiff’s version of events is on oath, the defence is able to plot its path knowing of the view of the plaintiff’s experts about those events. The defendant has the freedom to select from its available lay evidence and may choose to discard some witnesses. More likely it may choose to discard experts who may, in light of the plaintiff’s evidence, be seen as less favourable to the defendant. The opportunity for strategic, tactical decisions is obvious to any experienced advocate. This forensic advantage,

not available to the plaintiff, has traditionally been justified because the plaintiff bears the burden of proof.

The traditional process can make for an inefficient trial. Experts are required to prepare their evidence with regard to the instructions they receive as to the relevant factual history. The account of those events may change either when the plaintiff's lay evidence is given, or more likely when the plaintiff's witness are cross-examined. It may also change, sometimes significantly, when the defence has called its lay evidence. If the instructions change then so must the expert's opinion, sometimes quite significantly.

The New South Wales *Uniform Civil Procedure Rules* now permit judges to direct that an expert "give evidence at any stage of the trial, whether before or after the plaintiff has closed his or her case".⁴¹ The court retains a general power under these *Rules* to "give such directions as it considers appropriate in relation to the use of expert evidence in proceedings."⁴² The *Rules* of the Australian Capital Territory courts contain a similar power.⁴³

Both because of its efficiency and the prospect of real change in an expert's perception of their role in the trial process, it is common that we change the order in which evidence is given. Unless for any reason it will be inappropriate in a particular case, all of the factual evidence is now received in advance of any expert being called. If the case is one of any complexity the factual evidence may be followed by a short break, perhaps a couple of days or occasionally longer, during which the

⁴¹ *Uniform Civil Procedure Rules* 2005 (NSW) r 31.35(a)(ii)

⁴² *Uniform Civil Procedure Rules* 2005 (NSW) r 31.20(1)

⁴³ *Court Procedures Rules* 2006 (ACT) rr 1211(1)(j), 1211(2)

experts will have an opportunity to review the transcript. This will enable them to understand the extent to which the relevant factual accounts are consistent and where they diverge. It ensures that the experts are able to give their evidence with a clear understanding of the facts which are accepted and those which are in dispute. The process eliminates the guesswork and enables the controversy to be refined. It encourages the experts to cooperate with each other in assisting the judge to arrive at the correct conclusion. We refer to it as a “phased trial.” Although it has only been used for a short while, we believe it has significant benefits both for the integrity and efficiency of the trial process. Judges of various State courts,⁴⁴ the Federal Court⁴⁵ and the Family Court⁴⁶ now have express power to defer expert evidence until some or all of the relevant factual evidence has been led.

⁴⁴ Australian Capital Territory, Northern Territory, South Australia and New South Wales

⁴⁵ *Federal Court Rules* 1979 (Cth) r 34A.3(2)(c)(i)

⁴⁶ *Family Law Rules* 2004 (Cth) r 15.70(b); *Court Procedures Rules* 2006 (ACT) r 1211(1)(c)(i); *Supreme Court Civil Rules* 2006 (SA) r 213(1)(a); *Uniform Civil Procedure Rules* 2005 (NSW) r 31.35(a)(i)

APPENDIX A

Uniform Civil Procedure Rules 2005 (NSW)

Rule 31.35 - Opinion evidence by expert witnesses

In any proceedings in which two or more parties call expert witnesses to give opinion evidence about the same issue or similar issues, or indicate to the court an intention to call expert witnesses for that purpose, the court may give any one or more of the following directions:

(a) a direction that, at trial:

- (i) the expert witnesses give evidence after all factual evidence relevant to the issue or issues concerned, or such evidence as may be specified by the court, has been adduced, or
- (ii) the expert witnesses give evidence at any stage of the trial, whether before or after the plaintiff has closed his or her case, or
- (iii) each party intending to call one or more expert witnesses close that party's case in relation to the issue or issues concerned, subject only to adducing evidence of the expert witnesses later in the trial,

(b) a direction that, after all factual evidence relevant to the issue, or such evidence as may be specified by the court, has been adduced, each expert witness file an affidavit or statement indicating:

- (i) whether the expert witness adheres to any opinion earlier given, or
- (ii) whether, in the light of any such evidence, the expert witness wishes to modify any opinion earlier given,

(c) a direction that the expert witnesses:

- (i) be sworn one immediately after another (so as to be capable of making statements, and being examined and cross-examined, in accordance with paragraphs (d), (e), (f), (g) and (h)), and
- (ii) when giving evidence, occupy a position in the courtroom (not necessarily the witness box) that is appropriate to the giving of evidence,

(d) a direction that each expert witness give an oral exposition of his or her opinion, or opinions, on the issue or issues concerned,

(e) a direction that each expert witness give his or her opinion about the opinion or opinions given by another expert witness,

(f) a direction that each expert witness be cross-examined in a particular manner or sequence,

(g) a direction that cross-examination or re-examination of the expert witnesses giving evidence in the circumstances referred to in paragraph (c) be conducted:

- (i) by completing the cross-examination or re-examination of one expert witness before starting the cross-examination or re-examination of another, or
- (ii) by putting to each expert witness, in turn, each issue relevant to one matter or issue at a time, until the cross-examination or re-examination of all of the expert witnesses is complete,

(h) a direction that any expert witness giving evidence in the circumstances referred to in paragraph (c) be permitted to ask questions of any other expert witness together with whom he or she is giving evidence as so referred to,

(i) such other directions as to the giving of evidence in the circumstances referred to in paragraph (c) as the court thinks fit.