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## Expert Evidence – Aces Up Your Sleeve?

### INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

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#### EXPERT EVIDENCE – ACES UP YOUR SLEEVE?

The Hon Justice Peter McClellan  
Chief Judge at Common Law  
Supreme Court of New South Wales

In his address on the occasion of the Administrative Appeals Tribunal's 30th Anniversary Chief Justice Gleeson emphasised that "effective and fair" use of expert evidence is currently an issue facing the court system. Over the last thirty years various mechanisms have been adopted to address problems with the cost and efficiency of the court process. Some courts have also reviewed their approach to expert evidence. Whilst sharing the Chief Justice's view I would go further. To my mind the "effective and fair" use of the learning of others in the resolution of disputes is one of the most significant issues which the courts face. Unless effective responses to identifiable problems are found community acceptance of the role which courts have traditionally performed in the resolution of disputes will be eroded.

Notwithstanding the efforts which have been made at reform it is still commonplace to hear complaints about the litigation process. One common complaint is the cost of the experts. Another question commonly asked is whether the courts, judge and/or jury are capable, without their own expert advice, of making decisions about complex scientific, medical, engineering or other issues. These are questions which cannot be ignored. Effective responses may only be possible if there is a preparedness to reconsider, not only the peripheral, but some of the fundamental elements of our present system of dispute resolution.

One assumption of the adversarial system is that argument between people (even heated argument) is the most satisfactory means of resolving a controversy. It accepts that parameters of the debate and the management of the process will be controlled by advocates for whom the intellectual integrity of the outcome is not an imperative. Their concern is to advance the interests of the client. We accept this approach to resolving factual questions, which may involve a challenge to a witness's recollection, credibility or reliability. We have, I suggest, without much thought, accepted the same approach to experts.

One consequence of the adversarial system is that witnesses, including many experts, consciously or unconsciously perceive themselves to be on one side or the other of the argument. Apart from the inefficiencies involved, the process discourages many of the most qualified experts from giving evidence. It is commonplace to hear people who have much to offer to the resolution of disputes - doctors, engineers, valuers, accountants and others - comment that they will not subject themselves to a process which is not efficient in using their time. It is equally common to be told that the person will not give evidence in a forum where the fundamental purpose of the participants is to win the argument rather than seek the truth. A process in which they perceive other experts to be telling "half truths" and which confines them to answering only "the questions asked" depriving them of the opportunity, as they see it, to accurately inform the court is rejected as "game playing" and a waste of their time.

Dr Martin Nothing has expressed the dissatisfaction felt by many medical practitioners in relation to the way medical evidence has traditionally been received in court. He said this:  
"The Australian Medical Association and its members have had an increasing interest in this field for many years, with the level of interest reaching a high point with the medical indemnity crisis in 2002. With the build-up to the medical indemnity crisis, expert medical evidence, legal processes and judgments in public liability and medical negligence cases became an increasing focus for medical practitioners in Australia ... There was a widespread concern amongst medical practitioners that

sound medical scientific principles did not seem to carry relevant weight in medical negligence Court cases and that at times maverick opinions from those who were considered to be hired guns, seemed to be the favoured evidence. As a member of the Federal Council of the Australian Medical Association during that time and up to the current time, I can attest to the intensity of feelings expressed by doctors on these issues.

... There is wide concern in the medical community with regards to the adversarial processes involved in obtaining our opinions. There is a wide perception in the medical profession that important medical principles and reasoning often does not seem to be understood by Courts. For that reason, many medical practitioners have stated categorically that they will not be involved in providing expert medical evidence in such settings. There is concern that the medical issues are handled in a manner which makes it difficult for them to provide an accurate account in order to properly inform the Court. The doctors are interested in seeing improved expert witness processes in order that Courts and Tribunals receive properly informed and quality expert opinion ... Doctors feel that the Courts are sometimes misled into making wrong decisions as a result of hired gun or biased expert opinions being presented and not properly tested." [1]

Shortly after my original appointment to the Supreme Court in 2001 I was asked to preside at a trial where the plaintiff alleged that tobacco smoke in the workplace had caused her cancer: *Sharp v Port Kembla Hotel & Port Kembla RSL Club*, 19 March 2001, NSWSC. The case was decided with a jury which was asked to determine whether to accept the evidence of expert scientists called by the plaintiff and the defendant. The issue was whether the plaintiff's cancer of the larynx had been caused by her exposure to tobacco smoke during her employment as a bar attendant in a club - a complex scientific issue.

Both the plaintiff and the defendant called doctors of undoubted qualifications and experience. The witnesses called by the plaintiff were all Australian which, I suspect, (although, of course, one will never know), was a significant factor in the outcome of the trial. The defendant called some Australian witnesses and two American scientists. The Americans were professors from eminent universities with considerable experience in relation to issues of smoking and cancer. Some of the defendant's witnesses were prepared to accept that at some future time the research may show a link between "passive" smoking and cancer although they did not believe that it could presently be demonstrated. The Americans were more emphatic. As far as they were concerned, there was no link between passive smoking and cancer.

If there had not been a jury I would, of course, have been required to decide the "scientific" issue. Both then and since I have contemplated the answer I may have given. It would have been a difficult task. However, I suspect for the jury it was made relatively straightforward.

Counsel for the plaintiff spent little time cross-examining the American professors about the scientific issue. Instead he concentrated on the fact that for many years they had both travelled the world and been paid handsome sums giving evidence on behalf of tobacco companies to the effect that there was no link between "active" smoking and cancer. As a result of one of the "smoking case" settlements in the United States, the information as to their past work for the tobacco industry was available on the Web, including the substantial fees paid to them.

Again one does not know, but I suspect that the jurors, once they were aware of the extent that the professors had given evidence for the tobacco industry in relation to "active" smoking issues, formed a negative view about the defendant's evidence which caused them to discard the whole of the defendant's scientific case irrespective of its quality. Apart from pondering the verdict I may have given, I have also wondered what the outcome may have been if the court had appointed an expert to assist in the resolution of the scientific issues.

Some years ago, when I was a barrister, I was asked to address a seminar about expert evidence. I was the first speaker and an engineer, much respected for giving expert evidence in litigation, was the other. There was the usual discussion period.

I gave an account of the conventional principles which bind an expert who is giving evidence. In particular, I emphasised the fact that experts were required to give objective evidence to assist the court in understanding matters which fall within the expert's area of "special learning". The expert's overriding obligation to the court was emphasised.

To my surprise the engineer who spoke after me, having explained how he conventionally approached his task of gathering evidence, preparing his report and handling the "dangers" of oral evidence, finished with a flourish saying "and of course at the end of the day your fundamental obligation is to do

the best you can for your client." Although the discussion which followed was lively, I doubt whether the engineer understood, much less accepted, the error in his approach.

It was also my common experience as a barrister in the early stages of preparation of a case that there would be two typical responses from experts at the first conference. Some experts, having been briefed with the relevant papers, would commence the discussion by indicating that they held a view about the matter which would either be favourable or unfavourable to the client. If they held a view which was adverse to the endeavour they would offer the opportunity for their services to be appropriately dispensed with.

Other experts would begin the discussion by saying "well I have had a look at the project, what can I say to help you."

### **The integrity of expert evidence**

Difficulties with the integrity of expert evidence have been recognised over a long period. In his well known article, *Learned Hand*, writing in the *Harvard Law Review* in 1901, challenged the accepted utility of expert evidence and the procedures by which it was received in a court:

"No one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best. In early times, and before trial by jury was much developed, there seemed to have been two modes of using what expert knowledge there was: first, to select as jurymen such persons as were by experience especially fitted to know the class of facts which were before them, and second, to call to the aid of the court skilled persons whose opinion it might adopt or not as it pleased. Both these methods exist at least theoretically at the present day, though each has practically given place to the third and much more recent method of calling before the jury skilled persons as witnesses. No doubt, there are good historical reasons why this third method has survived, but they by no means justify its continued existence, and it is, as I conceive, in fact an anomaly fertile of much practical inconvenience." [2]

The article contains a comprehensive discussion of the history and use of experts in the common law system and the perceived difficulties. These difficulties include the observation that in an adversary system the expert becomes the hired champion of one side. Further problems arise from the fact that, generally, the Court is a "lay tribunal", without any expertise, but is required to resolve a dispute between persons who may have expertise at the highest level of a particular scientific or professional discipline.

These problems have been acknowledged by many commentators. I have previously spoken about them [3]. *Learned Hand* was writing at a time when the complexity of litigation and of the issues which needed to be decided were significantly less than today. That growth in complexity has of course been accompanied by an enormous increase in the available knowledge in all areas of intellectual endeavour. Courts can be required to resolve disputes between experts as to the cause of accidents, the past and future financial consequences of the acts of others, the appropriateness of professional action, whether or not the exposure to tobacco smoke or other products can cause life threatening diseases and many other complex matters. The questions which a court must answer may have significant implications for the reputations of individuals and, of course, very significant financial consequences.

The expert who sees his or her task as being to help the client, whether it be consciously acknowledged or subconsciously assumed, has been observed by every experienced advocate. Upon the assumption that our civil litigation processes are designed to elicit the truth, we have assumed that the adversarial system, with its emphasis on rigorous debate, is the most appropriate structure within which to achieve this outcome. For my own part, I question that assumption in relation to the evidence of experts.

As *Davies J* points out in his paper "The Reality of Civil Justice Reform: why we must abandon the essential elements of our system" delivered at the 20th Australian Institute of Judicial Administration Annual conference in Brisbane in July 2002, when the adversarial system is employed to resolve civil disputes and parties are allowed to call evidence from their "own" experts, it is inevitable that the evidence will be infected by adversarial bias. It could hardly be otherwise. Only the most extraordinary person who has been engaged to prepare and give evidence for a client would, when cross-examined,

readily confess error, accept their view was wrong and the client's money wasted. It would be even harder to do this if the client is a regular litigator or the solicitor for the client is commonly looking for experts to help in forensic contests.

I was the Chief Judge of the Land and Environment Court for two years. In that court the financial incentive to do the "right thing" by your client is very powerful given the potential profit from major development and the fact that many developers will have multiple projects before the Court in any one year.

Whereas ordinary civil litigation involves a dispute between private corporations or individuals where the rules of the contest are known and accepted, even if discovering the truth is not always the object of the parties or the outcome of the case, litigation in the Land and Environment Court requires a decision which not only has regard to private interests but must incorporate the aspirations of the general community. Whether a high rise residential building should be approved will involve the interests of the developer who seeks to profit from the development, the immediate neighbours who may be impacted by it, the local community who may also experience negative impacts from traffic, a drain on community resources or a change in the built environment, and the wider community which has an interest in ensuring that acceptable housing is provided for all who wish to live within the metropolitan area.

Given the overriding community interest in the outcome, there will be many cases where leaving the parties to call their own experts is obviously unsatisfactory. It can also serve to unnecessarily duplicate the primary research which must be undertaken and increase the length and cost of hearings.

#### **The response of the Land and Environment Court**

In the Land and Environment Court, as in other courts, the initial response to the identified problems with expert evidence was to articulate through Practice Directions the expectations which the Court had of the objective and impartial exposition of the issues requiring special expertise. As my experience at the seminar to which I referred makes plain, it must be doubted whether that message has been received, at least by some who give evidence.

The Court has also moved to require experts to confer before the hearing with a view to identifying the matters upon which they agree and those in respect of which they disagree. By this means, it is intended that issues could be narrowed and the views of the experts objectively defined, thereby enhancing the quality of the ultimate decision and reducing the time for the hearing.

Commencing in March of 2004, the Court imposed a presumption that in relation to any issue requiring expert evidence, a court expert will be appointed. Although each case must be looked at individually, a court expert will be appointed where the Court is satisfied that there may be cost savings to the parties or where the issue involved is such that the integrity of the ultimate decision will benefit from the appointment of an expert by the Court. When a court expert has been appointed a party may, with the leave of the Court, seek to call an expert who that party has retained. Generally, provided the Court is satisfied that the additional expert will add useful information to the discussion, leave is granted. Experience has shown that the court expert's opinion is not always accepted by the judge or commissioner but that in every case the integrity of the decision made has been significantly enhanced.

Although appointed by the Court, the parties are required to agree on the person who is to carry out the task. The parties are jointly and severally liable for the expert's fees which are generally agreed with the expert by the parties and fixed by the Court.

It was made plain to me at a seminar where a number of experts spoke a short time after the new processes were introduced, that at least some experts are prepared to publicly acknowledge that, when engaged by a particular party, their evidence has previously been structured to favour that party but, when appointed by the Court, greater objectivity and balance return. The preparedness to publicly confirm that which we have previously suspected is no doubt a result of the pressure which experts now feel to put forward their credentials for appointment as an expert capable of unbiased assessment of a particular problem. When I made the changes, I anticipated that the appointment of court experts would raise the quality of all expert evidence. That expectation has been confirmed.

The advantages of this approach to expert evidence are many. Because the costs are shared in many cases the costs of expert evidence to both parties are significantly reduced, probably halved. A saving

in costs cannot always be achieved. However, there is no doubt that the integrity of the expert evidence is enhanced and this must be reflected in the quality of the ultimate decision.

Although the move to appoint court experts initially met significant resistance from the legal profession, I believe that resistance is now diminishing. With the change has come a clearer understanding of the deficiencies of the old approach and the benefits which change can bring. For the experts, it is about giving back to them the opportunity to use their expertise, without obligation to a client, and the ability to express their views without the distortions that can come from the adversarial process. Those lawyers who remain sceptical of the process typically argue that the client (although in many cases they mean the lawyer) loses control of the evidence which is tendered. Although it might be seen as a problem if the court was taking control of the lay evidence, I cannot accept that it is inappropriate where expert evidence is involved.

### **Concurrent Evidence**

At the same time as the Land and Environment Court moved to appoint experts, it also changed the process by which expert evidence is given in Court. This is now done concurrently and all experts in relation to a particular topic are sworn to give evidence at the same time. What follows is a discussion, which is managed by the judge or commissioner, so that the topics requiring oral examination are ventilated. The process enables experts to answer questions from the Court, the advocates and, most importantly, from their professional colleagues. It allows the experts to express in their own words the view they have on a particular subject. There have been cases where as many as six experts have been sworn to give evidence at the same time.

For hearings in my court, the procedure commonly followed involves the experts being sworn and their written reports tendered together with the document which reflects their pre-trial discussion of the matters upon which they agree or disagree. I then identify, with the help of the advocates and in the presence of the witnesses, the topics which require discussion in order to resolve the outstanding issues. Having identified those matters, I invite each witness to briefly speak to their position on the first issue followed by a general discussion of the issue during which they can ask each other questions. I invite the advocates to join in the discussion by asking questions of their own or any other witness. Having completed the discussion on one issue we move on until the discussion of all the issues has been completed.

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 referring to each other on first name terms. Within a short time of the discussion commencing, you can feel the release of the tension which normally infects the evidence gathering process. Those who might normally be shy or diffident are able to relax and contribute fully to the discussion.

This change in procedure has 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 respond to the views of the other expert or experts. They believe that there is less risk that their evidence will be distorted by the advocate's skill. It is also significantly more efficient. 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% of the time which would have been necessary.

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 actually have the expert's views expressed in his or her own words.

I am sometimes asked, particularly by advocates, whether concurrent evidence favours the more loquacious and disadvantages the less articulate witness. In my experience, the opposite is true. Because each expert must answer to their own professional colleague, the opportunity for diversion of attention from the intellectual content of the response because of the manner of its delivery 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 witness 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 who, under the scrutiny of the courtroom, 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 step in and ensure each witness has a proper opportunity to express his or her opinion.

### **Some further thoughts**

Over recent decades governments in Australia have responded to requests for the review of administrative decisions from the individuals affected by them. It is now common for there to be a review by tribunals comprising of professional people who, in many cases, are not lawyers, but appointed because of their expertise in an area of relevance. The same approach has been commonly taken with development control. This form of review tribunal has been created because of a recognition that lawyers, however skilled, cannot be expected to have the knowledge of a particular discipline which a senior member of the relevant profession may have. The expert can assist the tribunal to identify relevant issues and assist the tribunal's understanding of the evidence. As the knowledge in every professional discipline increases, the expectation that a judge alone is the appropriate person to decide a claim in a court will be increasingly questioned. Although judges are likely to maintain the role of primary decision-maker they may need assistance. The opportunity for the court to be aided by advisers, assessors or referees is already available. It may be that courts will adopt the administrative review model with the inclusion of professionals in the decision-making processes. No doubt any proposal along those lines will prove controversial. For my part I believe it likely that in time this approach to decision making will become part of the trial process of the courts.

### **The AMA Policy**

I referred earlier to the remarks of Dr Nothling. To address the problem the Australian Medical Association has adopted a policy (AMA Policy Resolution on Expert Witnesses, passed 4 February 2005) of which the key elements are the joint briefing of experts selected by the parties and the use of court appointed medical practitioners in the event that a case proceeds to a hearing and complex medical issues remain in contention. The Association would like to see a panel of experts maintained by the court from whom the court expert would be chosen.

Although I can foresee difficulties with a court maintaining a register of expert doctors, the use of experts chosen because of their expertise and independence from any party is a request which must be considered. It is naïve to respond that the adversarial system will work it all out. Plainly, after decades of experience the doctors do not believe it will.

### **Responding to criticisms**

I am aware of the doubts which exist in relation to the use of single or court appointed experts. Many of those who have entered the discussion have not experienced the use of court experts and speak only from a theoretical position. Common criticisms include that it will preclude debate where there may be a genuine disagreement amongst professionals about the issue. The concern is that only one side of the story will be told. The fear is misplaced. No one has suggested that there will not be cases where, if more than one view is relevant, they will not be placed before the court.

Much of the criticism reflects our faith in the adversarial system where the assumption is that an argument, sometimes a heated one, where the party's objective is to win, is the only effective method of resolving the problem. No other institution or group in the community adheres to that view.

It is not uncommon to hear comments which challenge the proposition that experts giving evidence craft their material to suit the interests of their client. Justice Downes of the Federal Court and President of the Administrative Appeals Tribunal has commented that in his experience "with very few exceptions, [expert witnesses] do not deliberately mould their evidence to suit the case of the party retaining them. When they do, it is obvious" (see AILA Expert Evidence Seminar, Melbourne, 11 November 2005). This opinion is offered to rebut the argument that adversarial bias infects the validity of expert evidence given by witnesses who have been retained by a party.

Justice Downes' observation overlooks two matters. Firstly, adversarial bias is not a problem that is solely, or even predominantly, a product of conscious distortion of the evidence to suit the client. Sometimes, although in my experience by no means always, deliberate attempts to misrepresent the position will be exposed during the course of the trial. However, it is the fact of joining the litigation team and the influence of the inevitable human desire to win the debate which is the greater problem. To my knowledge Justice Downes has not acknowledged or responded to this problem. As for his statement that "with very few exceptions witnesses do not deliberately mould their evidence" I can only say that his Honour has been fortunate in the cases he has been involved with. I am sure Justice

Hunt when he spoke of the “unholy trinity” of experts traditionally called by the GIO (see *Vakauta v Kelly* (1988) 13 NSWLR 502 at 506), or Justice Sperling when he referred to the expert witness as a “front line soldier, carrying his side’s argument on the technical issues under the fire of cross-examination,” (Sperling J, “Expert Evidence: The Problem of Bias and Other Things” (2000) 4 TJR 429 at 432) would find Justice Downes’ view at odds with their own experience.

Lord Woolf did not idly come to the view that many expert witnesses “are in practice hired guns.” His views were the product of many years in practice, experience as a judge and a process of wide consultation before recommending reforms.

Similar problems have been noted by other people of great experience including Lord Chief Justice Dallas, [4] Lord Chief Justice Campbell, [5] Lord Chief Justice Cockburn, [6] Lord Jessel, [7] Learned Hand, [8] Judge Regan, [9] Professor Langbein [10] Justice McHugh, [11] Justice Dawson, [12] Thorpe LJ, [13] Justice Wilcox [14] and Justice Einstein, [15] to name but a few. A 1999 study of 244 Australian judges revealed that 85% of the judges surveyed had encountered partisanship in expert witnesses, and that 40% of respondents thought this was a significant problem. [16]

Another criticism which is commonly made is that any system of single or court appointed experts will limit the opportunity for debate between experts with genuinely held but different views. Those who advance this criticism of the process in the Land and Environment Court may not have read the materials in which I have discussed how the system works. In that court the parties are required to approach expert evidence upon the assumption in merit appeals that a single expert, agreed by the parties and appointed by the court, will provide the expert assistance. However, if at any stage in the process the parties are able to persuade the court that, because of a relevant and genuine divergence of view, another expert will assist in the resolution of the matter the court will grant leave to call the other expert. The threshold is low. It may be that the additional expert will be required to give evidence about the whole of the issue or issues in dispute or maybe only as to part. Rather than prepare a full written (and normally costly) report, the report of the additional expert may be limited or, perhaps, that person will be confined to giving only oral evidence. A variety of procedures are possible. However, the flaw in the criticism is that the use of a single expert imposes a rigid process on the litigation when the opposite is true.

One of my primary motivations in introducing experts appointed by the court in the Land and Environment Court was the enormous wastage which was occurring when multiple experts in the same discipline prepared reports after collecting and documenting the same factual material. I used to speak about noise consultants and others have taken up the theme when advancing criticisms of single experts.

It is possible to cheat when taking background noise readings. The most obvious problem is where do you place the microphone – behind the house or in front of it. Some people believe the time and place of taking the measurements are subjective. In fact they are not. Objective criteria are imposed by the relevant Australian and other standards. And as for the prediction of future noise levels, this is a matter rarely amenable to divergent expert opinion. The formulae by which noise impacts are calculated have long since been agreed and accepted. Computer software which is derived from those formulae is now universally available and applied.

Justice Downes has suggested that “if the (noise measuring) instruments are in good order and properly employed there will generally be no dispute at the hearing as to what the background noise level is. No expert evidence is required.” This is, in part, correct. However, an expert is still required to use the sophisticated instrument and take the readings. But as his Honour acknowledges, you do not need two experts when one can do the job.

When criticising the use of single experts, Justice Downes often says “the fallacy underlying the one expert argument lies in the unstated premise that in the fields of expert knowledge there is only one answer” and his Honour says “of course, this is nonsense.” He illustrates his point by reminding us that the members of the High Court, not infrequently, give different answers to the same problem and when they agree on the answers they often differ as to the reasons. So much is plain. But his Honour overlooks the fact that the overwhelming majority of cases are decided by the views of one judicial officer and there is no appeal. As I have said, to portray the argument for single experts as denying the opportunity to explore genuine divergence of views is to misstate or misunderstand what is being said. However, to deny the parties an opportunity for a potentially cheaper and, in many cases, quicker resolution of their dispute is to refuse to acknowledge that there will be many cases where, because the judge does not have the required expertise, the assistance of an expert is required, who will, without controversy, enable the court to resolve either a part or the whole of the dispute.

It is also suggested that parties may be disadvantaged if the court appoints an expert because they will inevitably retain their own “shadow” expert and incur greater expense. In some cases this will be true. However, the “shadow” does not have to prepare a written report (normally at least half if not more of the cost of an expert who gives evidence) and even if ultimately the “shadow” gives evidence their report may be confined or their evidence limited to an oral presentation. The parties share the cost of the court appointed expert. In most cases only one party will seek leave to call their “own” expert evidence.

It is plain that the critics are attracted to a dispute resolution process which contemplates rigorous debate. I have no difficulty with that concept. However, Justice Downes has gone so far as to say that “I do not even mind experts who are ‘hired guns’ provided that they are not presenting evidence that is unsustainable, particularly where this could only be known by the expert.”

I am afraid that I do have a problem with “hired guns”. The task for a judge in resolving a controversy in a complex area of science or medicine, particularly given the burgeoning of scientific knowledge, is difficult and for this reason expert evidence is admitted. If we sanction the “hired gun” not only will we come up with wrong answers, but the litigants, genuine experts and ultimately the public at large will lose any vestige of respect for the court process. As Laddie J said in *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] Fleet St Reports 818: “If litigation is to be conducted as if it were a three card trick, what is wrong with having a couple of aces up your sleeve.”

### **Recent debates**

At a recent seminar held to discuss the issue of expert evidence following the report of the New South Wales Law Reform Commission, Wayne Lonergan, an accountant, spoke in critical terms of the use of single experts in the Family Court. Mr Lonergan’s criticisms were many and he used colourful language to convey them.

In the Law Society Journal of August this year Chief Justice Bryant of the Family Court responds to Mr Lonergan’s criticism by making plain that the primary reason for that court moving to use the single expert was a concern about the integrity of the evidence which the court was receiving. In her response to Mr Lonergan the Chief Justice expresses similar thoughts about the evidence given in the Family Court to my own thoughts when discussing the changes made in the Land and Environment Court. The Chief Justice makes plain that although cost was a concern of the Family Court, the integrity of the evidence was the overriding reason for making changes to its process.

### **The Supreme Court**

Since I took up my present position changes have come to expert evidence in the Common Law Division. With the agreement of the parties, issues such as cost of computers, motor vehicle expense and cost of care (as distinct from the need for care) in personal injury cases are now addressed by a single expert. The parties generally still call their own experts on whether care is required and the level at which it should be provided.

Steps are being taken to ensure that pre-trial directions are given so that where there is more than one expert the evidence can be taken concurrently. This procedure has been followed in some recent cases and I expect that before long it will be common.

I recently 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 which required the calling of 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 1 ½ 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. It was a most stimulating discussion of a medical problem by four highly qualified and experienced practitioners. Although a day of intense



concentration and intellectual endeavour for all involved it was, without question, the most satisfactory means by which to receive and consider their evidence. 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. I have no doubt the process was welcomed by the cardiologists.

### Conclusion

The Australian community, as with the communities of other developed countries, increasingly demands efficiency from the processes of government and public corporations. At its core the challenge is to ensure that the issues which need resolution are identified and the available resources are efficiently applied to resolving them. This has meant that the “old” way of doing things may sometimes be discarded and resources focused on a “new” way. The courts are accepted as the appropriate place to resolve disputes amenable to litigation, although critical scrutiny of the litigation process is now common. It will continue. Where problems can be identified the challenge is to respond appropriately to them.

Writing in 1999 Sir Anthony Mason expressed the view that adversarial justice has a future and the point needs to be made “that very considerable improvements have been made in Australian court systems in recent years” but the courts stand ready “to make further changes once it is established that they are desirable.” Expert evidence is one area where change is not only desirable but inevitable. [17]

### END NOTES

1. 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
2. L Hand, “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 *Harvard Law Review* 40 at 40
3. McClellan, “Recent Changes and Reforms at the Land and Environment Court”, speech delivered to the Local Government Association of NSW, 27 July 2004; McClellan, “Expert Witnesses” the recent experience of the Land and Environment Court” (2005) 17 *Judicial Officers Bulletin* 83; McClellan, “Environmental Issues: how should we resolve disputes?” (2005) (1) *National Environmental Law Review* 36; McClellan, “Problems with Evidence” speech for the Government Lawyers’ Annual Dinner, 7 September 2004
4. *Severn, King and Co v Imperial Insurance Co* (1820), discussed in T. Golan, *Laws of Men and Laws of Nature*, Harvard University Press, Cambridge, 2004, pp. 62 and 68.
5. In an 1856 trial his Honour said: “With regard to medical witnesses, I must observe that, although there were among them gentlemen of high honour, consummate integrity, and profound scientific knowledge, who came here with a sincere wish to speak the truth, there were also gentlemen whose object was to procure an acquittal of the prisoner. It is, in my opinion, indispensable to the administration of justice that a witness should not be turned into an advocate, nor an advocate into a witness.” quoted in: NSWLRC, *Expert Witnesses*, Report 109, June 2005 at 2.26.
6. *Simpson v Wilson* (1862), discussed in T. Golan, *Laws of Men and Laws of Nature*, Harvard University Press, Cambridge, 2004, at p. 88.
7. *Thorn v Worthing Skating Rink Co* (1877) 6 Ch D 415: “A man may go, and does sometimes, to a half-a-dozen experts. I have known it in cases of valuation within my own experience at the Bar. He takes their honest opinions, he finds three in favour and three against him; he says to the three in his favour, will you be kind enough to give evidence? And he pays the three against him their fees and leaves them alone: the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one.”
8. L. Hand, “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 *Harvard Law Review* 40.
9. *Ladner v Higgins* 71 So 2d 242 (1954).
10. J. H. Langbein, “The German Advantage in Civil Procedure” (1985) 52 *University of Chicago Law*

Review 823 at 835. Professor Langbein notes that Europeans are shocked by the partisan nature of our mode of calling witnesses, and that this “amazement turns to something bordering on disbelief” when it is discovered that “we extend the sphere of partisan control to the selection and preparation of experts.” He also points out that in America experts are sometimes colloquially referred to as “saxophones.”

11. In *Vakauta v Kelly* (1988) 13 NSWLR 502 at 526 his Honour describes what has been described elsewhere as “selection” bias: “It is only natural that solicitors acting for plaintiffs and defendants will have a plaintiff examined by doctors who have a tendency to support or reject, as the case may be, the case of the plaintiff. Medicine is not an exact science. There is room for a wide variety of honest and reasonable opinion concerning the effects and prognosis of personal injuries. Moreover, because a small group of insurance companies stand behind defendants in personal injuries actions and the bulk of plaintiffs' work is handled by a few firms of solicitors, a doctor, who is found to give reports favourable to the side invoking his services, will inevitably be called on regularly to give evidence in personal injuries litigation. Judges with experience in personal litigation cases are well aware of this phenomenon. Conflict between the opinions of the doctors called on behalf of the plaintiff and those called on behalf of the defendant are common place.”

12. *Vakauta v Kelly* (1989) 167 CLR 568 at 576: “Unfortunate or not, it is virtually unavoidable that a judge, sitting in a jurisdiction such as that in which the trial judge was sitting, should form some view concerning a party appearing in case after case and of the expert witnesses habitually called by that party.”

13. *Vernon v Bosley (No 2)* [1997] 1 All ER 614 at 648: “In my judgment on the appeal I commented upon the unsatisfactory contribution of the mental health professionals at the trial. I recorded the judge's finding that the plaintiff's experts, including of course Dr Lloyd and Mr Mackay, were flawed in that they had assumed the very thing that the plaintiff was required to prove. I also recorded the judge's conclusion that the defendant's experts were *parti pris*. The reopening of this appeal has now revealed the degree to which at least Dr Lloyd and Mr Mackay amongst the plaintiff's witnesses were also partisan. Without any inkling of what the reopening of the appeal has subsequently revealed I commented upon the danger that an expert witness who has a well-established patient relationship with the plaintiff might develop therefrom a sympathy for or identification with the plaintiff that jeopardised objectivity. I emphasised that mental health experts in the family justice system owe a duty to the court which in the event of conflict manifestly prevails over any duty to the party giving instructions. I criticised the defendant's experts for their partisan performance, suggesting that their loss of objectivity might be ascribed to their daily attendance at the trial which had tempted them into sharing attitudes, assumptions, and goals with the defendant's litigation team. Had I then known what is now revealed I would have been equally if not more critical of Dr Lloyd and Mr Mackay. Whilst Stuart-Smith LJ rightly observes that the erroneous judgment of the plaintiff's counsel bears responsibility for the considerable extension of this appeal, and conceivably the appeal itself, the dilemma from which the error stems was plainly created by the readiness of both Mr Mackay and Dr Lloyd to do their best to present the plaintiff's condition on different dates and in different proceedings in the light that seemed most helpful to the immediate cause, ignoring their equal or greater duty to the court and disregarding the very considerable inconsistencies that inevitably developed.”

14. In *Universal Music Australia v Sharman Licence Holdings* (2005) 20 ALR 1 at 13 his Honour said: “The principal parties relied heavily on evidence from so-called “independent experts”. Much of this evidence was helpful, some of it extremely valuable. Some of this evidence was not helpful, either because it related to a peripheral, even irrelevant, matter or because I was compelled to form an adverse view about the objectivity or intellectual integrity of the witness. I mention, in this context, particularly Dr Roger Clarke, whose evidence on behalf of the Altnet parties was little more than a partisan polemic, and, to a lesser extent, Professor Ross.”

15. *Baulderstone Hornibrook Engineering v Gordian Runoff (formerly GIO Insurance)* [2006] NSWSC 223 at [83]: “Unfortunately the opinions of Professor Ingold also suffer from the fact that the Court has no confidence that his opinions were always given objectively. The finding is that he has spent so much time and been so involved over so many years in providing advice for BHE in relation to its litigious problems arising from the runway defects, that his objectivity has suffered. Whether this may be subliminal is not to the point. The detailed reasons for this finding are set out in the judgment. His many changes in stance suggest a high lack of confidence in his own opinions: it being quite clear that his opinions have changed over time, indeed continuing to change in the witness box, the changes being often quite radical. These are not matters which give the Court confidence in the opinions expressed by an expert. The frequent changes in direction are problematic enough even without the super added objectivity issue where the difficulty is to work out when his opinion is entirely

uninfluenced by his partiality and when it is or may very well be affected by that partiality. Regrettably there is no bright line test for the Court when trying to discern which opinions can be accepted as of substance.”

16. I Freckelton, P Reddy, I Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study*, Australian Institute of Judicial Administration, Carlton, 1999, cited in: Sperling J, “Expert Evidence: The Problem of Bias and Other Things” (2000) 4 *TJR* 429 at 430.

17. Sir Anthony Mason: *The Future of Adversarial Justice* – unpublished 1999.