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The New Rules

EXPERT WITNESS INSTITUTE OF AUSTRALIA
AND
THE UNIVERSITY OF SYDNEY
FACULTY OF LAW

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THE NEW RULES

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

Chief Justice Gleeson recently emphasised that the "effective and fair use of expert evidence is an issue currently facing the court system." [1] To my mind, as I have previously written, the effective and fair use of expert evidence is one of the most significant issues which the courts now 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. [2] Inevitably, and this has occurred in other areas of litigation, the response will involve modification of the adversarial system as the courts exercise greater control over the litigation.

Significant public concerns about the role of experts and the quality of expert evidence surfaced in 2004. [3] This was no surprise. The issue, which came to public attention was contingency fees - experts who were being paid only if the client won. Of course this phenomenon was not new – many common lawyers were aware of experts who had been retained by plaintiffs on a "no win, no fee" basis. Although this issue triggered the inquiry by the NSW Law Reform Commission, the terms of reference were far more comprehensive.

The Commission reported in June 2005. My purpose this evening is to identify the recommendations of the Commission which have been incorporated in the rules and procedures which are used in the Supreme Court. Many of the recommendations were already in place in some form in other courts – notably the Land and Environment Court.

The Supreme Court adopted the Uniform Civil Procedure Rules which commenced on 15 August 2005. Changes to the Rules were required to take up the Law Reform Commission recommendations. Before the changes were made the Report of the LRC was considered by the Attorney General's Working Party on Civil Procedure, which has a cross-jurisdictional composition and is responsible for developing amendments to the rules. [4] Amendments were made to the UCPR with effect from 8 December 2006. [5]

Along with changes to the rules, changes have been made to the practices in the Common Law Division of the Court. The General Case Management Practice Note was amended effective from 29 January 2007. [6] In due course changes will also be made to the practices in other areas of the court's work, in particular in the area of professional negligence. Apart from providing more effective pre-trial management of cases the changes have been made to ensure the most effective use of expert evidence at the trial.

RECOMMENDATIONS OF THE COMMISSION
Recommendation 6.1
The UCPR should be amended to provide that in civil proceedings parties may not adduce expert evidence without the court's permission

This recommendation suggested the adoption by the courts of the "permission rule" as it is known in the United Kingdom. The Commission intended that by adopting the rule the courts could achieve complete control over experts. However, it was not incorporated into the UCPR. It may be that when

the Land and Environment Court ultimately determines which provisions of the UCPR should be adopted by that Court a form of permission rule may be considered. Many cases in that Court could be resolved by the "expert commissioners" without the need for further expert evidence.

Although the permission rule 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.

Rule 31.18 provides various definitions including definitions of "court-appointed expert" and "parties' single expert." The practical impact of the changes begins with 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 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 list of directions which the court may consider giving. Together with Rule 31.19 it gives the Court extensive control over the expert evidence to be tendered at any trial.

Rule 31.20 provides:

(1) Without limiting its other powers to give directions, the Court may at any time give such directions as it considers appropriate in relation to the use of expert evidence in proceedings.

(2) Directions under this rule may include any of the following:

(a) a direction as to the time for service of experts' reports;

(b) a direction that expert evidence may not be adduced on a specified issue;
(c) a direction that expert evidence may not be adduced on a specified issue except by leave of the court;
(d) a direction that expert evidence may be adduced on specified issues only;
(e) a direction limiting the number of expert witnesses who may be called to give evidence on a specified issue;
(f) a direction providing for the engagement and instruction of a parties' single expert in relation to a specified issue;
(g) a direction providing for the appointment and instruction of a court-appointed expert in relation to a specified issue;
(h) a direction requiring experts in relation to the same issue to confer, either before or after preparing experts' reports in relation to a specified issue;
(i) any other direction that may assist an expert in the exercise of the expert's functions;
(j) a direction that an expert who has prepared more than one expert's report in relation to any proceedings is to prepare a single report that reflects his or her evidence in chief.

The decision not to provide a permission rule was justified in the report of the Working Party. The

report emphasised the need for control of litigation by courts together with maintaining desirable flexibility. A "regime as to expert evidence that permits maximum possible flexibility" [7] serves to accommodate different requirements and practices in different courts for different kinds of subject matter of varying degrees of complexity and importance. It was determined that, unlike the UK, NSW courts have "strengthened case management powers enormously" [8] in the CPA and UCPR."

The Working Party was hesitant about intruding inappropriately into the adversarial system and recognising the opportunity provided by case management said that it is necessary to carefully balance "courts tak[ing] a more controlling interest in what occurs" and the "responsibility and prerogative of the parties" [9] to procure the evidence they wish to adduce.

The Working Party felt that a "permission rule" would remove flexibility and that existing case management techniques should be utilised to effectively manage expert evidence. The WP Report stated:

"But, particularly where a developed framework of case management already exists, within which the giving of expert evidence is generally dealt with, the goal of flexibility is better met by the subject continuing to be dealt with in that context."[10]

I have already mentioned but should emphasise that although a "permission rule" in absolute terms was not adopted rule 31.20 allows the Court to exercise significant control over the parties' use of expert witnesses. The Court is empowered both to deny a party the opportunity to call expert evidence on a particular issue as well as limit the number of experts called in the proceedings as it considers appropriate.

Recommendation 7.1
The UCPR should be revised to include provision for joint expert witnesses in addition to the existing provisions for court-appointed experts.

The Woolf Reforms [11] in the UK placed particular emphasis on the use of single experts. The use of single joint experts has been regarded as "arguably the most significant and controversial recommendation of Lord Woolf's Report concerning expert evidence." [12] Rule 35.7 of the UK Civil Procedure Rules provides:

> (1) Where two or more parties wish to submit expert evidence on a particular issue, the Court may direct that the evidence on that issue is to be given by one expert only.
> (2) The parties wishing to submit the expert evidence are called "the instructing parties."
> (3) Where the instructing parties cannot agree who should be the expert, the Court may:
> (a) select the expert from a list prepared or identified by the instructing parties; or
> (b) direct that the expert be selected in such other manner as the Court may direct.

Single experts are also encouraged by the Queensland *Uniform Civil Procedure Rules* 1999. The rules [13] in relation to expert witnesses, establish a presumption [14] in favour of the appointment of a single expert witness, either by agreement of the parties or by order of the court. There is particular emphasis on one expert per issue.

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

The LRC Report said of joint expert witnesses:

> "In general terms, the idea of the joint expert witness is to limit the expert evidence on a question arising in the proceedings to that of one expert witness, selected jointly by the parties affected, or, if they fail to agree, in a manner directed by the court. If a party is dissatisfied with the expert's evidence, the court has discretion to allow that party to adduce other expert evidence. While the evidence of the joint expert witness is likely to be of great weight, the joint expert witness has no different status from other witnesses and will be available for examination by any party if required."

> 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." [15]

Recommendation 7.1 is supported by the following explanation:

> "The Commission believes that, under the present system, there exist significant problems with the way expert evidence comes before the court. These problems form a powerful argument in favour of amending the rules to provide a further option to the court, namely to order the use of a joint expert witness. 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." [16]

Subdivision 4 of Part 31 of the UCPR (Rules 31.37 – 31.45) has been incorporated to provide for parties' single experts. The Court may order at any stage of proceedings that an expert be engaged jointly by the parties. [17] A "parties' single expert", is engaged and selected by agreement of the parties. [18] The parties take the initiative. The "selection of the expert by the parties is integral to the concept of the joint expert witness." [19]

Other provisions in Subdivision 4 include:

- the parties' single expert must give their consent; [20]
- if a party knows a person under consideration for engagement as a parties' single expert, that party should not communicate with the person about issues in dispute prior to the engagement; [21]
- parties endeavour to agree on written instructions to be provided to the parties' single expert; [22]
- the parties' single expert may apply to the court for directions; [23]
- the parties' single expert must send a signed copy of their report to each of the parties; [24]
- before the report is tendered, parties may seek clarification of any aspect of the report; [25]
- the report of the parties' single expert and any clarifications may be tendered in evidence by any of the parties; [26]
- any affected party may cross examine the parties' single expert; [27]
- unless by leave of the court, a party is prohibited from adducing evidence of another expert on an issue for which a parties' single expert has been already engaged; [28] and
- the remuneration of the parties' single expert is to be fixed by agreement or otherwise in accordance with court directions. [29]

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."

Subdivision 5 of Part 31 contains, inter alia, provisions relevant to the selection and appointment of a court-appointed expert. [30] The remaining provisions, although renumbered, are identical to those in former Division 3 of Part 31 prior to 8 December 2006, save for the following additions:

- a court-appointed expert must give their consent to the appointment; [31]
- if a party knows a person under consideration for engagement as a court-appointed expert, that party should not communicate with the person about issues in dispute prior to the engagement; [32]
- the court may give directions as to the issues to be dealt with and the facts or factual

assumptions to apply in the court-appointed expert's report; [33]
- the court may give direction that parties are to endeavour to agree on instructions to be provided to the expert; [34]
- the court-appointed expert may apply to the court for directions; [35]
- any party may apply for leave of the court to seek clarification of any aspect of the court-appointed expert's report. [36]

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 where a court has appointed an expert in relation to an issue. There is a presumption in favour of one expert per issue.

Recommendation 9.2
The UCPR should be amended to require that the fee arrangements with an expert witness be disclosed.

When an expert's remuneration depends on the successful outcome of proceedings there will be a risk of bias. However, many deserving plaintiffs would have no expert evidence if such arrangements were prohibited.

The LRC Report says in support of recommendation 9.2:

> "funding arrangements relating to each expert witness be known to all parties and to the court. There should be disclosure of all fee arrangements, including any arrangement for deferral of payment, in whole or in part, and of the payments which have actually been made to the expert under whatever arrangement is on foot. Disclosure in those respects would reveal any arrangement for deferral." [37]

The WP Report was not in favour of full disclosure of financial arrangements between the expert and the engaging party and proposed a modified approach. It said:

> "It is generally agreed that disclosure is necessary and should be compelled in all cases where there is a speculative element or an arrangement for deferral of payment, since this may give the expert witness an interest in the outcome of the proceedings.
>
> However, while there is a case for disclosure in all cases, there is also a case that routine revelation of fees in all cases is an unwarranted intrusion and one which may lead to a diminution in the pool of persons available as expert witnesses, which would be an unfortunate development." [38]

The amended rules adopt the WP's approach. Rule 31.22 provides:

> (1) A person who is engaged as an expert witness in relation to any proceedings must include information as to any arrangements under which:
>
> (a) the charging fees or costs by the expert witness is contingent on the outcome of the proceedings, or
>
> (b) the payment of any fees or costs to the expert witness is to be deferred,
>
> in, or in an annexure to, any report that he or she prepares for the purposes of the proceedings.
>
> (2) If a report referred to in subrule (1) indicates the existence of any such arrangements, the court may direct disclosure of the terms of the engagement (including as to fees and costs).

Recommendation 9.3
There should be a provision, by rule or practice note, requiring that expert witnesses be informed of the sanctions relating to inappropriate or unethical conduct.

The recommendation was supported by the following comment by the LRC:

> "The Commission considers that the existing "sanctions" are appropriate and sufficient, and that attempting to adopt a more punitive approach would be unlikely to be effective, and may have the unintended consequence of discouraging suitable experts from giving expert evidence. However, there should be a requirement, by rule or practice note, that expert witnesses be notified of the sanctions available in the case of inappropriate or unethical conduct." [39] (emphases added)

The LRC Report identified a series of possible adverse consequences, which it characterised as forms of "sanction" against an expert who acts unprofessionally in their capacity as an expert witness:[40]

- The expert witness might be criticised by the court, and may lose credibility, and thus a reduced prospect of further work as an expert witness.
- Disciplinary proceedings might be taken against the expert witness within the relevant profession.
- The expert witness might be charged with contempt or perjury.

The LRC went on to say:

> "It is obvious that dishonest or unprofessional behaviour by expert witnesses is likely to reduce the likelihood of the court reaching a just decision, and may have other adverse consequences, such as lengthening proceedings and adding to costs. The real issue is to find ways of reducing or eliminating such behaviour." [41]

The WP decided not to implement the recommendation. It believed that a requirement, be that by rule or practice note, that expert witnesses should be informed of existing sanctions for inappropriate or unethical conduct, runs the risk of discouraging [42] suitable experts from giving expert evidence. It believed that the existing means of exerting control over expert witnesses should not be overlooked. Schedule 7 of the UCPR comprises the "Expert witness code of conduct". This, together with the use of 'joint expert witnesses' [43] (both parties' single experts and court-appointed experts, as discussed earlier) were believed to minimise the risk of unprofessional behaviour.

CONCURRENT EVIDENCE OF EXPERTS

Although not the subject of any recommendations, the LRC Report endorsed the procedure by which experts give evidence concurrently. The LRC Report 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. [44]
- The process moves somewhat away from lawyers interrogating experts towards a structured professional discussion between peers in the relevant field. [45]
- Experts typically make more concessions, and state matters more frankly and reasonably, than they might have done under the traditional type of cross-examination. [46]
- The questions may tend to be more constructive and helpful than the sort of questions sometimes encountered in traditional cross-examination. [47]
- The taking of expert evidence concurrently will no doubt be more successful in some situations than in others; in the case of some judges and some types of cases, concurrent taking of evidence is very successful. [48]
- Concurrent evidence has considerable potential to increase the likelihood of the court achieving a just decision. [49]

From its inception, the UCPR rules have facilitated concurrent evidence. Rule 31.35 ("Opinion evidence by expert witnesses") contains the following terms:

"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:

…
(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."

THE NEW GCM PRACTICE NOTE

The revised practice note took effect from 29 January 2007. It makes a number of significant changes to the pre-trial management of civil cases, particularly in claims for damages for personal injury or disability. The most significant change in relation to expert evidence is contained in paragraph 37:

> 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.

The practice note also confronts the problem of multiple experts and suggests as a guide the following: [50]

- one medical expert in any specialty and two, if and only if, there is a substantial issue as to ongoing disability; and
- two experts of any other kind.

The practice note reinforces the use of single expert witnesses in relation to any head of damages in respect of which a party seeks to adduce expert evidence. [51]

Rule 31.24 of the UCPR (repeated in the Practice Note SC Gen 11) provides that the Court may direct expert witnesses to hold a joint conference. They may be directed to: [52]

- confer generally or in relation to specified matters; and
- prepare a joint report specifying matters agreed and not agreed and reasons for disagreement

The report prepared by the experts becomes the primary document from which the evidentiary

discussion between the experts is developed. For those looking for a more comprehensive discussion of concurrent evidence there is a DVD available for a modest fee from the NSW Judicial Commission.

END NOTES

1. M Gleeson, “Outcome, Process and the Rule of Law”, speech delivered on 2 August 2006 to mark 30th anniversary of the AAT
2. P McClellan, “Expert Evidence – Aces up your sleeves?” speech on 20 October 2006 at NSWIRC Annual Conference
3. “Inquiry into use of expert witnesses”, Jonathan Pearlman, SMH, 7 September 2004; “Best evidence better than best expert”, judge says, Jonathan Pearlman, SMH, 8 September 2004
4. Members of the Working Party are: Mr Justice Hamilton (Chair); Justice Biscoe; Judge Garling, Judge Johnstone; Deputy Chief Magistrate Paul Cloran; Christopher Wood, Greg George and Hamish Stitt representing the Bar; Gary Ulman representing the Law Society; Tim McGrath, Jennifer Atkinson, Steven Jupp, Stephen Olischlager, Tony Grew and Craig Cooke representing the Attorney General’s Department. The Working Party is to be distinguished from the Uniform Rules Committee which has powers to make or amend the rules, pursuant to s 9 of the CPA
5. The amendments are contained in Uniform Civil Procedure Rules (Amendment No 12) 2006: see NSW Government Gazette No 175
6. The GCM Practice Note SC cl 5 issued on 5 December 2006 and that commenced on 29 January 2007 replaces the GCM Practice Note issued on 17 August 2005
7. Report of the Attorney General’s Working Party on Civil Procedure (‘WP Report’) [4]
8. WP Report [7]
9. WP Report [10]
10. WP Report [11]
11. “Access to Justice: Final Report to the Chancellor on the Civil Justice System in England and Wales”, July 1996
12. LRC Report [4.16]
13. These rules only apply to proceedings in the Supreme Court of Qld: rr 429E, 429F
14. UCPR 1999 (QLD) r 429H(6)
15. LRC Report [7.6], [7.7]
16. LRC Report [7.33]
17. UCPR r 31.37(1)
18. UCPR r 31.37(2)
19. LRC Report [7.57]
20. UCPR r 31.37(3).
21. UCPR r 31.37(4).
22. UCPR r 31.38.
23. UCPR r 31.39.
24. UCPR r 31.40.
25. UCPR r 31.41.
26. UCPR r 31.42.
27. UCPR r 31.43.
28. UCPR r 31.44.
29. UCPR r 31.45.
30. UCPR r 31.46.
31. UCPR r 31.46(3).
32. UCPR r 31.46(4).
33. UCPR r 31.47.
34. UCPR r 31.47.
35. UCPR r 31.48.
36. UCPR r 31.50.
37. LRC Report [9.41].
38. WP Report [26], [27].
39. LRC Report [9.76].
40. LRC Report [9.75]. Reference to the court’s power to make a costs order against an expert witness is erroneous, as was pointed out in WP Report [30], where it was suggested that such a power could be created by an amendment to UCPR r 42.3: WP Report [31].
41. LRC Report [9.73].
42. LRC Report [9.70].
43. LRC Report [9.74].
44. LRC Report [6.56].
45. LRC Report [6.56].
46. LRC Report [6.56].
47. LRC Report [6.56].
48. LRC Report [6.57].

49. LRC Report [6.59].
50. Practice Note SC CL 5 para 34.
51. Practice Note SC cl 5 paras 41-43
52. UCPR r 31.24(1).