

**UNIVERSITY OF OXFORD**  
**FACULTY OF LAW**

**1 December 2015**

**CONCURRENT EXPERT EVIDENCE –  
THE NEW SOUTH WALES EXPERIENCE**

**Justice Peter Garling RFD**

**Supreme Court of New South Wales**

**Introduction**

- 1 The purpose of this paper is to discuss expert evidence and, in particular, the concept of concurrent expert evidence, from the perspective as reflected in current practice in the Common Law Division of the Supreme Court of New South Wales. There is no universal practice amongst all of the jurisdictions throughout Australia, and there is some variation amongst individual judges within NSW. This is purely a personal reflection.

## Expert Evidence

2 But, in order to provide the context for this discussion, I must first just set out some basic principles about the admissibility of expert evidence in New South Wales.

3 The fundamental rule which governs the admissibility of all evidence is that it must be relevant. Relevant evidence is evidence which:

"... if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding."<sup>1</sup>

4 In *The Queen v Turner*<sup>2</sup>, Lawton LJ expressed the basis upon which expert evidence is received in these words:

"An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury."

5 A similar description was given by Gaudron and Gummow JJ in *Osland v The Queen*<sup>3</sup> when their Honours said:

"Expert evidence is admissible with respect to a relevant matter about which ordinary persons are "[not] able to form a sound judgment ... without the assistance of [those] possessing special knowledge or experience in the area."

6 In addition to any question of relevance, which can be assumed to be satisfied for the purpose of future discussion in this paper, the admissibility of expert evidence in NSW is governed by the provisions of the *Evidence Act 1995* (NSW). In respect to expert evidence, the position under the legislation is not too far distant from the common law position. The starting point is the existence of the opinion rule, contained in section 76(1), which provides that:

"Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed."

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<sup>1</sup> Section 55(1) of the *Evidence Act 1995* (NSW)

<sup>2</sup> (1975) QB 834 at 841

<sup>3</sup> [1998] HCA 75; (1998) 197 CLR 316

- 7 There are certain exceptions to that rule. One concerns the giving of opinions by experts. That exception is contained in section 79(1) which provides:

"If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge."

- 8 It can thus be observed that for the opinion of an expert to be admissible, there first needs to be a field of "specialised knowledge". That means knowledge which is part:

"... of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience..."<sup>4</sup>

and, secondly, that specialized knowledge must have been acquired as a consequence of any one or more of training, study and experience. None of the terms are defined. No minimum threshold for the length, type of training, study or experience is required. One's opinion as a lawyer on a matter of legal knowledge would be admissible once the person is professionally qualified, that is admitted as a legal practitioner. It does not require any advanced tertiary qualification. One does not have to be a professor of law. A plain reading of these words suggests that the threshold for qualification to express an opinion as an expert is a relatively low one. Of course, the mere fact of admissibility is far distant from the acceptance of that evidence by the court.

- 9 When one examines the wording of the opinion rule, it is easy to be distracted. The rule is expressed in terms of the proof of a fact, rather than an opinion. However, the High Court of Australia has made it clear that the opinion rule does not confine an expert witness to expressing opinions about matters of "fact". Rather the position is, as the majority held in *Dasreef Pty Ltd v Hawchar* that:

"... the opinion rule is expressed as it is in order to direct attention to why the party tendering the evidence says it is relevant. More particularly, it directs attention to the finding which the tendering party will ask the tribunal of fact to

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<sup>4</sup> [2011] HCA 21; (2011) 243 CLR 588

make. ... That requires identification of the fact in issue that the party tendering the evidence asserts the opinion proves or assists in proving.”

- 10 The admissibility of an expert opinion will thus depend upon the party tendering it establishing that the opinion is based on specialist knowledge, that it is relevant to a fact in issue, that the person expressing the opinion is an expert.

### **Relevant NSW Legislation**

- 11 Civil proceedings in the Supreme Court of New South Wales, are subject to the provisions of the *Civil Procedure Act 2005 (NSW)* ("CP Act"), and the Uniform Civil Procedure Rules 2005 (NSW) ("UCPR")<sup>5</sup>.
- 12 The Court when it exercises any of its powers in the course of case management, and the hearing of proceedings, is obliged to give effect to the overriding purpose of the CP Act which is to be found in section 56 in these terms:

#### **56 Overriding purpose**

- (1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
- (2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.
- (3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.
- ...
- (4) Each of the following persons must not, by their conduct, cause a party to civil proceedings to be put in breach of a duty identified in subsection (3):
  - (a) any solicitor or barrister representing the party in the proceedings,
  - (b) any person with a relevant interest in the proceedings commenced by the party.

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<sup>5</sup> A complete version of the *Civil Procedure Act 2005 (NSW)*, and the Uniform Civil Procedure Rules 2005 (NSW) can be accessed at: [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au).

- 13 Not only is the Court under an obligation to further the overriding purpose, but so are the parties and their lawyers.
- 14 In the course of case management, the Court is obliged to seek to act in accordance with the dictates of justice: section 57 of the CP Act. Other provisions of Part 6, Divisions 1 and 2 of the CP Act provide the Court with ample powers to ensure that the overriding purpose is achieved, and also govern how the Court is to proceed, including particular requirements to which the Court must, and may, have regard.
- 15 One of the techniques now regularly used for the facilitation of the overriding purpose is to take the evidence of retained experts concurrently. This concept I will shortly explore.

### **Retained Experts**

- 16 However, it is first convenient to make some comments about the Court's requirements for retained experts. I use the term "retained experts" here to refer to experts retained by the parties to give admissible expert opinion evidence. The term is also used to distinguish them from other forms of expert evidence, or evidence from experts: such as, single experts appointed by the Court; experts to whom identified questions are referred out; or witnesses who may have expert qualifications but who are giving their evidence in a different capacity, such as when they are party to the proceedings, or else are witnesses of contemporaneous fact.
- 17 Retained experts are obliged in giving their opinion evidence, whether in written form or orally, to comply with a Code of Conduct prescribed by the UCPR<sup>6</sup>. The Code provides that an expert witness has an overriding duty to assist the Court impartially on matters relevant to the expert witness's area of expertise. That paramount duty is owed to the Court and not to any party to the proceedings (including the person retaining the expert witness).

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<sup>6</sup> The complete Code of Conduct is to be found in Schedule 7 of the UCPR

Importantly, the Code notes that an expert witness is not an advocate for a party.

- 18 In providing an expert report in admissible form which generally stands as their evidence-in-chief, the expert is engaged in a task within the accepted and necessary framework of "... *fact, assumptions, reasoning process and opinions ...*"<sup>7</sup>. It is beyond the scope of this paper to discuss the complexities, and varying theories about the basis for the admissibility of expert evidence in written reports.
- 19 Extensive discussion can be found in a number of Australian cases<sup>8</sup>. Justice Heydon, when a member of the NSW Court of Appeal, succinctly encapsulated the admissibility requirements for expert opinion evidence in this way in *Makita Pty Ltd v Sprowles*<sup>9</sup> at [85]:

"In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in *HG v R [1999] HCA 2; (1999) 197 CLR 414*, on "a combination of speculation, inference, personal

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<sup>7</sup> *ACCC v Liquorland (Australia) Pty Ltd* [2006] FCA 826 at [840] per Allsop J

<sup>8</sup> See *ACCC v Liquorland (Australia) Pty Ltd* [2006] FCA 826; *HG v R* [1999] HCA 2; (1999) 197 CLR 414, *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705, *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; (2011) 243 CLR 588

<sup>9</sup> [2001] NSWCA 305; (2001) 52 NSWLR 705

and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise"

## **The Traditional Adversarial Approach**

- 20 An understanding of concurrent evidence, its benefits and disadvantages, commences with an understanding of the traditional approach to the giving of expert evidence in the ordinary system of adversarial proceedings which is to be seen throughout the common law world.
- 21 This traditional approach requires that the evidence is given individually with the expert witness being called at a time of the party's choosing in the course of the presentation of all of the evidence in their case. More often than not, the time of the calling of the expert is dictated by the expert's own schedule and availability. Once called, the expert's evidence-in-chief is elicited, generally, by the tender of their written report, or reports, and perhaps supplemented by some additional questions, particularly where the evidence in the trial up to that point in time may have differed from the factual assumptions upon which the expert expressed an opinion. Leave of the court is required in NSW (and many other jurisdictions) for any additional evidence to be adduced. The evidence in chief of experts called by a defendant often includes responding to the oral evidence given by the earlier experts.
- 22 After completion of the evidence in chief, the expert is then cross-examined by counsel for the opposing party or parties. Rarely, if ever, does that counsel have any formal qualification in the field of expertise of the witness. In my experience, that challenge, if it is to be successful will manifest itself in one or more of these forms:
- (1) A challenge to the expertise, learning or experience of the witness;
  - (2) A challenge to the facts which have been assumed for the purpose of expressing the expert's opinion, in the course of which different assumptions of fact are put to the witness, in an endeavour to obtain a different opinion from that previously expressed; and
  - (3) A challenge to the reasoning, and conclusions of the expert, often by reference to articles from learned journals, well accepted textbooks, or

the apparent “impeccable logic” of the opinions expressed by another retained expert, or experts.

- 23 In preparation for the cross-examination of an expert, there will usually be one or more conferences in chambers with the expert retained by that party. In the course of the cross-examination itself, counsel is, when challenging the evidence of the expert, desirably assisted by having one or more of their experts in the body of the Court making suggestions as to questions which might be put or lines of cross-examination which may be followed, and informing the cross-examiner of errors or matters of controversy in the evidence given by the witness, so that they could be addressed by the cross-examiner. In the days before instant electronic communication, that support was provided in whispered, hurried and often misunderstood conversations between counsel and the assisting expert. These days that information can come via email, or another form of instant messaging.
- 24 It is a feature of the traditional approach that the taking of the evidence of the retained experts on the same subject may be separated by some days, or weeks in longer trials, because the experts were called by the parties when they were in their cases and at a time which they thought best suited their cases. There was generally no scheduling restriction on the calling of experts with respect to the unfolding of the factual accounts. In many cases experts were not in possession, and were not asked accurately, to assume one or more plausible versions of the facts which had been established in evidence. This was commonly so in professional negligence cases where it is often the case that evidence of a professional defendant as to what had actually happened would vary in the course of oral questioning.
- 25 In those circumstances, where it was necessary to respond to the facts as they emerged, parties were put to the expense of recalling their retained experts. As well, the range of evidence from each expert often travelled over a good deal of ground which was common and undisputed, yet the Court heard, or was presented with, the whole of their evidence, which meant that in practice, some matters were much repeated, thereby occupying unnecessary time with resultant expense.



26 It will be obvious from this description that questions about the speed, efficiency and cost of the expert evidence, and of the trial generally, arose regularly.

### **Concurrent Expert Evidence**

27 As I have said earlier, the use of concurrent expert evidence has been regularly adopted in the NSW Supreme Court as a method to address the overriding purpose of doing justice whilst minimizing expense and delay.

28 Concurrent evidence is the process of taking the oral evidence of retained experts, of like disciplines, together at the same time. This means that each of the experts sits in the witness box next to one other. Each can be asked questions and in any order. Hopefully, their evidence becomes rather like a professional discussion, which aims to inform the trial judge of the solutions to the professional issues which are contained in the proceedings.

29 Concurrent evidence was described in this way by Justice McClellan<sup>10</sup> an early, and dedicated, user of it:

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

30 But that is really the final stage of the process. So, it will be convenient to outline and examine each of the stages of the process of concurrent evidence.

### **Concurrent Evidence: Preparation**

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<sup>10</sup> Law Institute of Victoria, Medicine and Law Conference: 29 November 2007. Available at [http://www.supremecourt.justice.nsw.gov.au/Documents/mcclellan\\_2007.11.29.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/mcclellan_2007.11.29.pdf)

- 31 The initial stage is, through judicial case management, to ensure that there is a proper preparation for a joint conclave of the experts. This is followed by the holding of the joint conclave. The end point of the joint conclave is the production of a joint report signed by each of the participants. The final stage is the giving of the oral evidence concurrently.
- 32 Preparation for concurrent evidence commences after the parties have obtained, and served reports from their retained experts which almost always reveal differing opinions upon which the Court will be asked to decide. If there is no disagreement amongst them, and their reports are complete, then little, if anything, more will be required of them. However, that is a most uncommon experience. Where reports are served which reveal differing opinions, then case management and judicial supervision is used to oversee the detail of the preparation for the joint conclave, and ultimately the oral evidence.
- 33 The time at which judicial case management is engaged, is a matter of considerable variation, and is very much case dependent. For my part, I prefer this step to occur once a final hearing date has been fixed, at least three months before that date and, preferably, not more than six months. This timing generally represents a stage of the litigation where the pleadings have been finalised, production of relevant documents has occurred (whether by summons or else through discovery) and statements of evidence and primary expert reports have been served. Generally, by this stage, the parties to the proceedings will have a good understanding about the factual versions of the parties, and the legal and factual issues which are in dispute, and which will need to be addressed at a trial. I should note that at this stage, in the ordinary course, the Court does not have copies of all of these documents.
- 34 My approach to the case management of this part of the process of concurrent evidence is to require production to the Court from each of the parties, of a number of documents. These documents are:
- A statement of the findings of fact for which each party contends, prepared in the form of assumptions which the experts will be asked to make for the purposes of expressing an opinion;

- A list of the issues which each party contends arise from the expert reports; and
- An index to the documents which each party wishes to provide to the experts.

35 The statement of the factual findings contended for is a document whose contents are almost entirely to be formulated by the parties because, by this stage of the proceedings, each party knows the facts which they will prove and have a reasonable expectation of the facts which will be proved by the other parties. The Court does not have that knowledge and accordingly, the parties are best placed to formulate the assumed findings of fact. The real role of the Court at this stage is to ensure that these assumptions are truly matters of fact and not matters of law, or matters which are wholly irrelevant to the proceedings. As well, the Court can assist by identifying those assumptions, the substance of which seem to be similar, and then exploring with the parties whether those assumptions can be expressed in terms with which the parties agree.

36 The next document is the list of issues, which to my mind is the most critical document in preparation for the joint conclave and concurrent oral evidence. That is because it largely becomes the outline for the joint report and, subsequently, the basis for the agenda for the concurrent evidence session.

37 Because of its central importance, this document needs careful attention by the parties, and the court. As it is the basis for the agenda, and the discussion of the experts in their concurrent evidence, in my view, it is undesirable to frame the issues as questions, in the same fashion as a permissible interrogatory. Such an approach involves framing the issues in a way which invites the experts to confine themselves to a single word answer such as "yes" or "no". Experience suggests that obtaining the agreement of the experts to issues framed in this way is likely to be very difficult. This is largely because expert opinions can rarely be reduced to simple "yes" or "no" answers, but require elucidation, clarification and qualification. There is a real temptation for lawyers when approaching the preparation of this document, to

ask questions which reflect legal issues, rather than to examine the expert reports to discern the expert issues, hence the reliance on questions requiring single word answers.

- 38 In my view asking issues in this way, which is more akin to the delivery of joint interrogatories, tends to constrain the experts in their joint conference from fully expressing their opinions and, by mutual discussion, determining whether their respective opinions on various issues are the same or are capable of agreement or whether there is a fundamental difference between them leading to their ultimate non-agreement on one or more of the issues posed. Accordingly, issues which have been framed to invite discursive answers will generally be much more effective to identify and elicit the real difference in the opinions between the experts.
- 39 Finally, I note two matters in passing. First, that it is not appropriate, in my view, to ask direct questions of, or to frame issues for, the experts which are matters of law because such matters are appropriately reserved for the trial judge. Secondly, it is always a wise precaution to include at the end of the list of issues provided to the experts, an item which permits them to identify and report on any other issue which they regard as relevant to their opinions.
- 40 The final document of the three referred to is a relatively straight forward one. It is an index of documents which is prepared by the parties but which still requires court approval. What this document envisages is a common index for a bundle of documents which is to be given to the each of the experts. The provision of a common bundle to the experts is really a matter of common sense. A joint conclave is not going to be productive if the participants don't all have the same information as the basis for the discussion and their attempt to reach agreement where possible.
- 41 Once these documents have been finalized, and approved by the Court, it then becomes a matter for the parties and their experts to arrange for the joint conclave to occur by the cut-off date fixed by the court's directions.

## Concurrent Evidence: The Joint Conclave

- 42 The joint conclave is a conference attended by the relevant retained experts, which takes place without the presence of any of the lawyers for the parties, and at which the experts, consistently with the Code of Conduct, discuss the issues with which they have been provided and attempt to reach agreement, where possible, on some or all of those issues.
- 43 It is highly desirable that the joint conclave takes place with all of the experts together in the same room. However, geographical, scheduling and cost constraints sometimes mean that this cannot be achieved. In such cases, the joint conclave can be held by an audio-visual link, by telephone or some other electronic means of instant communication. I have not yet heard of this being done by email, or instant messaging, and I doubt that this would ultimately achieve the goal of this important interaction.
- 44 The content of the discussions held during the joint conclave are confidential to the participants, and cannot be traversed in the evidence. Accordingly, the experts are free to discuss matters, change their mind, perhaps more than once, or modify their views and articulate their views to their colleagues without any fear of that process being used in evidence to form the basis of a challenge to their ultimate position.
- 45 The confidentiality of the process also means that a party which is disappointed by a change in the position of their retained expert cannot call that expert to account by seeking to know the contents of the discussion. Allowing that to happen would also undermine the notion that the primary duty of the expert is to the Court, and not to the party who retained them. As well, as the position presently stands in Australia, but not the United Kingdom<sup>11</sup>, the expert cannot be sued by any party for what they say either in a report prepared for the proceedings, or else what they say orally in evidence.

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<sup>11</sup> *Cabassi v Vila* (1940) 64 CLR 130; cf *Jones v Kaney* [2011] UKSC 43; [2011] 2 AC 398

- 46 Although a joint conclave is meant to be a polite and professional discussion, in some circumstances it has become necessary to appoint an individual to chair or facilitate such conference. The role of the chair is to ensure that the views of each participant are expressed, an adequate discussion takes place with respect to each of the identified issues which are, to the extent that agreement is reached, noted, and finally where there is no agreement on an issue, to ensure that the views of each expert are accurately and succinctly recorded. The circumstances in which the appointment of a chair has become necessary will vary from case to case. On some occasions, it is felt that the very number of experts attending the conference is sufficient to justify that course so as to make the conference more ordered and focussed. On other occasions, the personalities of the experts involved, particularly in small fields of practice, have meant that having a neutral chair will ensure that the conference is conducted efficiently, or politely. The chair can be a person from the same profession as those involved in the joint conclave. Equally, it may be a senior barrister, or retired judge.
- 47 The role of a chair is particularly useful where the participants in the joint conclave are not all present in the room together, but some are participating by other means. The chair can then ensure that the views of the participants who are not present are taken, shared and discussed, thereby giving each expert an adequate opportunity to participate. As well, where the conclave is conducted largely over the telephone or via an AVL link, the chair's role is to impose and keep discipline in the conclave, or a structure which ensures the completion of the task.
- 48 What is important to the role of the chair is to have someone who oversees the process of the joint conclave and the preparation of the joint report, rather than someone who feels entitled to, and does, participate in the substantive discussion.
- 49 As well, the provision of administrative assistance is also permissible to ensure that the joint report is prepared promptly, preferably by the end of the conference, so that any agreement reached is recorded. This has the

advantage of preventing later re-consideration of any changes in expert opinions and also of precluding an expert, whether with the help of additional research or else prompting from an overly eager lawyer, from changing the opinion agreed to at the conference when the report is later circulated, or else finding and giving a different position in the final report, which position was never the subject of professional discussion.

- 50 Whilst the joint conclave must consider the issues which are posed, it is always open to the participants to add in any issue which they jointly regard as being an important one for the court to be made aware of. In that way, the court ensures that the issues, at that stage, remain within the professional domain, and the experts have the opportunity to fulfil their duty to the court.
- 51 The end product of the joint conclave is the joint report signed by each of the experts that complies with UCPR 31.26.

### **Concurrent Evidence: The Joint Report**

- 52 Rule 31.26 of the UCPR makes clear provision with respect to the joint report. It is in these terms:

#### **31.26 Joint report arising from conference between expert witnesses**

- (1) ...
  - (2) The joint report must specify matters agreed and matters not agreed and the reasons for any disagreement.
  - (3) The joint report may be tendered at the trial as evidence of any matters agreed.
  - (4) In relation to any matters not agreed, the joint report may be used or tendered at the trial only in accordance with the rules of evidence and the practices of the court.
  - (5) Except by leave of the court, a party affected may not adduce evidence from any other expert witness on the issues dealt with in the joint report.
- 53 The essence of the report is to clearly disclose the matters agreed upon and not agreed upon, the nature and extent of the disagreement, and the reasons for that disagreement. It need not be a long or closely reasoned document.

Nor, typically, will it comply with the rules of admissibility for individual expert reports. But to require satisfaction of those provisions, is to consider and deal with the joint report as something which it is not intended to be.

- 54 The expert reports which are truly admissible in form and which set out the detailed reasoning of the expert, are those which are provided and served before the start of the concurrent expert evidence process. The joint report is intended to be an aid to the Court, the parties and the witnesses themselves, recording what is agreed and what is not, and why not. It records in a relatively short form the result of the professional discussion and hopefully, where facts have been clearly stated, the issues which are substantially uncontroversial can be agreed.
- 55 Whilst no particular form is necessary for the joint report, it will conventionally follow the issues posed, setting them out together with the answers of the experts, and the extent of their agreement or non-agreement.
- 56 After preparation and signature, the joint report is provided to the parties and to the court. Conventionally, it is admitted in its entirety and provides the basis for the concurrent evidence.

### **Concurrent Evidence: Oral Evidence**

- 57 All of the retained experts are required to attend and give their evidence to the court together – hence the term concurrent evidence, which is the usual description in Australia. It is now quite uncommon for judges in Australia who take expert evidence concurrently to use the original vernacular “hot-tubbing”.
- 58 Before the witnesses are sworn or affirmed, and identified in the traditional way, but after they are seated from where they will give their evidence, it is my practice to briefly outline what is intended to happen, describe the roles and functions of those in the courtroom, and to describe the ground rules for the session. In particular, I find it necessary to remind the participants that only one person can speak at any one time because often when a discussion takes place, the witnesses can forget that they are in a courtroom.



- 59 In giving this outline, I commence with identifying the role of the trial judge and remind them that it is the judge's task to control the proceedings by, in effect, being the chairman of their professional meeting, so as to ensure that the agenda items are all covered in an orderly fashion, to ensure that each of the witnesses has an opportunity to state their opinions and the basis for them and, ultimately, to ensure that the process is conducted fairly to the parties, and each expert and with civility.
- 60 I also remind the expert witnesses that their task whilst participating in the concurrent evidence session is to give their evidence truthfully, not as an advocate for one party or the other, but impartially so as to assist the court on the matters relevant to their expertise. I also take the opportunity to remind them in accordance with the Code of Conduct that their paramount duty is to the court and not to the party who (or which) has retained them.
- 61 After this explanation is concluded, the witnesses are then sworn and identified, and their concurrent evidence session begins. The course of the evidence generally follows the list of issues which has been provided to the experts and which has formed the basis of the joint report.
- 62 Commonly the trial judge will commence by establishing to their satisfaction what the state of agreement is with respect to each issue separately, and then by a process of careful questioning elicit the other opinions and the basis for them, on that issue. The trial judge will, if appropriate seek an explanation as to why an opinion is held, and why the differences of opinion exist. As that questioning develops, the trial judge will call on any opposing expert to explain their view and the basis for it, and then ask each expert to identify what the real difference is and how that is to be justified from the perspective of each of them. This process often sparks questions from one witness to the other, and comments by one witness on what the other witness has said. The aim of this is to establish a real and professional dialogue on the issues which are disputed to ensure that the judge is adequately informed of the expert opinions in their own words.

63 Putting it somewhat differently, the giving of concurrent evidence is intended to resemble a discussion in which a co-operative endeavour is engaged to identify the relevant issues and, where possible, arrive at an agreed resolution of them. To the extent appropriate, the joint evidence is subject to judicial control, as Justice McClellan said in the extract set out above, much like the control by a chair of a meeting. But concurrent evidence differs from a meeting because it is critical that all appropriate formality is observed, as the context for the "professional discussion" remains the giving of sworn evidence in a courtroom.

64 Accordingly, at the conclusion of the first issue (or item on the agenda) and after the judge has finished raising any matters, counsel for each of the parties then, in turn, can question the witnesses ensuring as they do that each expert has the opportunity to answer the question asked. In other words, the examination of the experts by counsel bears little similarity to the typical cross-examination. The purpose of counsel's questions is to ensure that an expert's opinion is fully articulated and tested against a contrary opinion, perhaps even an opinion elicited by the judge. As Giles JA said at [107] in *Turjman v Stonewall Hotel Pty Ltd* [2011] NSWCA 392:

"When concurrent evidence is being taken with a degree of direction by the judge, counsel are not passengers. They can and should seek to raise material issues and put material questions to the witnesses ... , if necessary submitting that the judge's view of how the evidence should be brought out should be modified. "

65 This process is then repeated for each item until all of the issues have been dealt with. 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 partisan experts and adversarial counsel, there is usually no difficulty in managing the hearing justly and efficiently.

66 At the end of the concurrent evidence session, the judge will ask a general question to ensure that all of the experts have had the opportunity to fully

explain their position, and adding anything relevant which may have been overlooked.

### **Concurrent Evidence: A Question of Timing**

- 67 There is one feature of the oral concurrent evidence session which is of real importance in the efficient conduct of the trial and the success of the process. That is the issue of when the concurrent evidence will be taken in relation to a particular the stage of the trial, and the calling of factual witnesses in each party's case. Since experts from all sides are giving evidence together, niceties about whether one is in the case of one party or another may arise. In theory, this may have some effect upon the making of a decision whether to call any evidence or not.
- 68 In adversarial litigation, it is not at all uncommon for a defendant to conduct their case by not calling any witnesses, either factual or expert, and relying on such progress as can be made in cross-examination of the other party's witnesses. This can be a matter of considerable tactical advantage. As well, the decision as to whether to proceed in that way can be delayed, and hence not revealed to the trial judge or other parties until the very last minute, and then once the opposing case has been finally closed.
- 69 In considering the timing of the concurrent expert session, the issue becomes whether the court ought to require that all of the relevant witnesses of fact to be called by all of the parties give their evidence before the concurrent evidence session. Why is that important? It is to be recalled that the experts have been given various factual assumptions upon which to base their joint report (or their earlier individual reports). The acceptance or rejection of expert evidence, or the weight to be given to it, necessarily depends upon the extent of the coincidence between the assumptions of fact made by the witness, and the facts which are proved in the evidence. As the High Court of Australia said in *Paric v John Holland (Constructions) Pty Ltd*<sup>12</sup>:

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<sup>12</sup> [1985] HCA 58; (1985) 59 ALJR 844

"It is trite law that for an expert medical opinion to be of any value the facts upon which it is based must be proved by admissible evidence (Ramsay v. Watson [1961] HCA 65; (1961) 108 CLR 642). But that does not mean that the facts so proved must correspond with complete precision to the proposition on which the opinion is based. The passages from Wigmore on Evidence ... (Wigmore on Evidence, (1940) 3rd ed., vol.II, 680, p.800; 2 Wigmore, Evidence 680 (Chadbourn rev. 1979), p.942) to the effect that it is a question of fact whether the case supposed is sufficiently like the one under consideration to render the opinion of the expert of any value are in accordance with both principle and common sense."

- 70 The practice which is followed in the Court is for the expert concurrent evidence session to be scheduled to take place, effectively, at the end of the case. That means that all of the factual evidence to be called must be called before the experts give their evidence. This enables the parties to formulate any additional assumptions of fact to be put to the experts, and enables the experts to give their opinions on much more complete sets of factual assumptions than might otherwise be the case. It ensures so far as possible that there will be coincidence between the proved and assumed facts.
- 71 This is very significant in cases where unexpected factual evidence has emerged during the evidence of either party, because it means that an expert who has previously given evidence for a party, does not have to be recalled to give further expert opinion evidence based on the newly revealed or established facts.
- 72 In cases where the facts are likely to be particularly complex and are only likely to be revealed after many witnesses have given evidence and been subject to cross examination, then on occasion the Court will order that the trial is to be conducted as a "phased trial", where the initial phase is devoted to the factual process and then, after parties have had the opportunity to consider the factual evidence and prepare statements of factual assumptions, the entire process of concurrent evidence can begin. This means that there may be a break of many weeks between the phases, which itself has disadvantages. This phased trial process is another example of the development of a case management technique to meet the particular of complex litigation.

## Some Reflections

73 That there are advantages of concurrent expert evidence over other evidence taking methods is undoubted. Debate continues as to what they are and the extent of the advantage. Some academics suggest that the absence of any rigorous analytical studies preclude the formation of any sound conclusions.

74 Without seeking to participate in that debate, I venture to suggest that the advantages which are identified will vary from individual to individual. Those identified advantages will depend upon the particular piece or pieces of litigation in which the individual has been involved. No doubt it also depends upon the role in the proceedings of the observer and their perception of the outcome. All of these matters would no doubt form a part of any evaluative analysis which would be undertaken.

75 As a barrister, I saw a number of advantages, principally:

- a concentration of the process of cross-examination of experts which considerably reduced the time spent in the process of cross-examination, including the preparation for it;
- being able to rely upon one or other expert to do much of the technical work in confronting the other expert with the defects in their opinion. This was particularly useful in technical areas which were at the margin of my comfort zone; and
- being able to avoid responsibility when unfavourable evidence was given in the course of the process of judicial questioning during the concurrent evidence.

76 But as a barrister the feature of concurrent evidence which I found most troubling was the impact which it had on the ability to control the development of the evidence in a case, and the ability to control an expert as a witness - either during examination in chief or else in cross examination. By that I mean that one feature of the adversarial process is that a barrister chooses and formulates the question which he or she wishes to ask, and then insists on the expert witness answering that question which may have been carefully formulated to achieve an identified answer. Particularly with

cross-examination, one could also follow threads of evidence through to an unexpected conclusion because of an answer given, or else perhaps the way in which an answer was expressed. The expert witness in that circumstance often had little assistance in what to them was an unfamiliar environment. As well, one could stop at a point which had been chosen as being the most advantageous position. Shortly put the traditional adversarial process gave counsel a much higher degree of control and influence on the content of expert evidence which was being revealed.

77 Because the whole process of concurrent evidence sees a significant lessening of the traditional adversarial process, that degree of control and influence is largely removed from counsel and, hence, the parties. Predictions about the result become, necessarily, more uncertain. Counsel and parties are thus more suspicious of the process and more resistant to it.

78 From my perspective as a Judge, I see different advantages from when I was a counsel. They include;

- the whole process, including the joint conference and joint report, generally narrows the issues which are in dispute between the parties to a significant extent, thereby making more efficient the decision making process, and shortening the process of judgment writing;
- the evidence of each expert on a particular issue is taken together so that when considering the evidence for the purpose of writing a judgment, opinions on similar issues are easily identifiable and little room for doubt exists as to what the opinion is, and what the basis of the opinion, and the counter-opinion is. Each expert opinion is given in answer to the same question. The transcript over a limited number of pages contains the whole of the expert debate;
- extreme expert opinions and "pseudo-experts" have become very rare, because these individuals are loathe to be exposed to the presence of their peers and being required to engage in a viva voce debate with them, in circumstances where they will be likely to have future contact with each other in a professional context. The debate between expert and expert is very much harder for a pseudo-expert than is the debate between that person and a barrister who does not have those qualifications; and

- there are considerable time savings in the hearing component of a case in which expert evidence is taken concurrently. In my experience, the oral concurrent evidence session rarely takes more than a day, and often half a day, whereas the taking of individual expert witnesses would be likely to occupy double that length of time, or even longer.

- 79 There are two of these features which merit further comment. The first is the matter of the advantageous effect of the concurrent expert process in reducing, if not eliminating, the presence of the "pseudo-expert". I use that term to describe an individual who is formally qualified to express the particular opinion but has no real expertise in the relevant field, and whose opinions can conveniently be called "junk science". The Supreme Court of the United States dealt with this issue in *Daubert v. Merrell Dow Pharmaceuticals* (92-102), 509 U.S. 579 (1993). The effect of this decision has been effectively to prescribe a standard for a trial judge to deal with the acceptability of expert evidence of expert evidence<sup>13</sup>. This is not an easy process in practice, sometimes takes considerable time and can incur significant expense. That expense can be increased if an erroneous ruling is made, and a retrial follows a successful appeal. The process of concurrent evidence has in practice meant that extreme opinions, and opinions which would fail the *Daubert* standard, are rarely presented to the court. If they are admitted and form a part of the discourse, the other experts can be relied upon to expose their lack of scientific rigour and authenticity.
- 80 Section 192A of the *Evidence Act* 1995 (NSW) permits the court to give an advance ruling on the admissibility of evidence, such as an expert opinion. Occasionally, and rarely when the admissibility of an opinion is challenged, the course which is usually adopted is for an advance ruling to be sought before the start of the process of concurrent evidence. If the opinion is ruled inadmissible, then the expert will not be permitted to attend the joint conclave,

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<sup>13</sup> The Cornell University sponsored Legal Information Institute has sufficiently for present purposes summarized the "Daubert Standard" as the "*Standard used by a trial judge to make a preliminary assessment of whether an expert's scientific testimony is based on reasoning or methodology that is scientifically valid and can properly be applied to the facts at issue. Under this standard, the factors that may be considered in determining whether the methodology is valid are: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community.*"

or be a signatory to the joint report. It is in that way, that the Court can address the requirements discussed in *Makita* and admit or reject the report. This will have the same substantial effect in applying an appropriate standard for expert evidence as the application of the *Daubert* standard has in the United States.

81 The second feature worthy of comment is the last feature because it produces significant cost savings for the parties and also has much less disruption to the schedules of the expert witnesses. In the traditional method of taking expert evidence, it was commonly the case that parties would ask their expert to sit through, and observe, the evidence being given by the other experts, so as to provide assistance to the cross-examiner. Sometimes, although very rarely, an expert would sit in to listen to a witness of fact. This was expensive process. The use of concurrent evidence eliminates this form of expert assistance and participation and has a real advantage in terms of efficiency and savings of cost and expense.

82 Without any doubt, the process of concurrent evidence involves the presiding judge undertaking a good deal more preparation for the oral evidence session than would traditionally be so. That is because the judge needs to be well-informed about the issues and the respective views of the experts to enable him, or her, to ensure that all opinions and their bases are understood and teased out. However, this additional preparation is off-set by the fact that it is necessary for the judge, in any event, to fully comprehend the expert opinions and the bases for them, so as to be able to decide the dispute and to write their judgment. So, the reality is that the reading and understanding takes place at an earlier time and, importantly, any lack of understanding about the opinions or misconceptions in the judge's mind can be cleared up by the experts themselves. In that way a judge derives real assistance directly from the experts.



- 83 Another advantage from the judicial perspective was identified in this way by Justice McClellan<sup>14</sup>:

"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 other's 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. "

- 84 It is the words in the last sentence which particularly resonate with me. Experience has taught that comparing the evidence of experts in order to decide an issue in a judgment or else make sensible submissions as an advocate at the end of a case, where the evidence is seen largely through the prism constructed by the words of each different cross-examining counsel, is a very difficult task. Any case management process which eliminates this difficulty leads to a better quality of decision making, and the never-ending pursuit of more efficient justice.

## Conclusion

- 85 In the five years, or more, since becoming a judge, I have conducted many trials with the use of concurrent evidence, including one where I took concurrent evidence, much to their surprise, from four UK experts in London<sup>15</sup>. In the Common Law Division of our Court, it is now the norm. I have had as many as six experts give their evidence concurrently. Often there have been just two. On all occasions, it has been my experience that I have had the benefit of multiple expert advisers upon whose assistance I could rely to decide, often quite difficult, issues as justly and efficiently as possible .

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<sup>14</sup> Law Institute of Victoria, Medicine and Law Conference: 29 November 2007. Available at [http://www.supremecourt.justice.nsw.gov.au/Documents/mcclellan\\_2007.11.29.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/mcclellan_2007.11.29.pdf)

<sup>15</sup> Judgments in these cases reflect the benefits of the process of concurrent evidence: see *King v Western Sydney Local Health Network* [2011] NSWSC 1025, *Rail Corporation NSW v Vero Insurance Ltd* [2012] NSWSC 632, *Tarres v Rozelle Carriers Pty Ltd* [2011] NSWSC 1410, *Garzo v Liverpool/Campbelltown Christian School Limited & Anor* [2011] NSWSC 292, *Kerney v Mead & Anor* [2011] NSWSC 518. The judgment involving the UK experts is *O'Reilly v Western Sussex NHS Trust (No.6)* [2014] NSWSC 182. Other examples of concurrent evidence being used in the Supreme Court of NSW can be found at [www.caselaw.nsw.gov.au](http://www.caselaw.nsw.gov.au).

- 86 Trials have been shorter and less expensive. The long-standing issues of judicial concern about pseudo-expert opinions, and experts who are merely advocates for the party which retained them, have largely, but not entirely, disappeared. Complex expert issues are able to be identified and dealt with more effectively and with a greater understanding of them.
- 87 From my perspective, in my current role, it is a most worthwhile process which has resulted in better decision making, with less cost and expense, than the traditional adversarial system of taking expert evidence.

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