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The Expert's Lament

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1 One area of practice and procedure that is pivotal to the operation of both the Supreme Court of New South Wales and the Land and Environment Court is the area of expert assistance to the court. In recent years both courts have moved towards the procedure of concurrent expert evidence. Although this procedure is widely supported[1] it is not without complexity. The Expert Code of Conduct imposes an "overriding duty" on the expert to "assist the court impartially". It provides that the "paramount" duty is owed to the court and "not to any party to the proceedings (including the person retaining the expert witness)".[2] The Code also provides that an expert is not an advocate for a party.[3]

2 Some history to the practice and procedure of expert assistance to the court indicates that it is not merely cost reduction and efficiency that caused the development of the concurrent evidence method. Controversy has also featured as a cause for change.

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[1] Gary Edmond, *Secrets of the "Hot Tub": Expert Witnesses, Concurrent Evidence and Judge – Led Law Reform in Australia* (2008) 27 *Civil Justice Quarterly* 51-82.
[2] *Uniform Civil Procedure Rules* 2005 (NSW) Schedule 7 par 2(2).
[3] *Uniform Civil Procedure Rules* 2005 (NSW) Schedule 7 par 2(3).

A little history[4]

3 In the 16th and 17th centuries experts furnished assistance directly to the court more in the mode of assistants to the judge and not called by either side to the litigation.[5] During this time the court appointed experts "advised" the court on such topics as: whether or not a wound was mayhem;[6] what the Latin was for "fine";[7] and whether a child born at 40 weeks and more after the death of the deceased could have been his child.[8]

4 It was in those years that expert assistance was held in high regard. Indeed such a system was seen as "honourable and commendable". In seeking such opinion it was said "we do not despise all other sciences but our own, but we approve of them and encourage them as things worthy of commendation".[9]

5 However, the system gradually changed to the system in which the expert gave evidence like other witnesses, called by one of the parties to the litigation. That development brought with it allegations that it is only natural that an expert will be prejudiced to the cause of the party by whom the expert is retained. Over the years those allegations have been expressed with varying degrees of apparent cynicism.

The reputation declines

6 In 1843 it was said:

> "…hardly any weight is to be given to the evidence of what are called scientific witnesses; they come with a bias on their minds to support the cause in which they are embarked"[10]

7 In 1873 it was put in the following terms:

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[4] This draws on the paper delivered by PA Bergin at the 1993 National Medico-Legal Congress, Sydney: *The Expert Witness in Court – A Practical View*.

[5] *Buckley v Rice Thomas* (1554) 1 Plow. 118; 75 E.R. 182; *Alsop v Bowtrell* (1619) Cro. Jac. 541; 79 E.R. 464.

[6] Lib. Ass. 28, pl. 5 (28 Edw. III).

[7] 9 Hen. VII, 16, pl. 8.

[8] *Alsop v Bowtrell* (supra).

[9] *Buckley v Rice Thomas* (1554) 1 Plow. 118 at 125; 75 E.R. 182 at 192.

[10] *The Tracy Peerage Case* (1843) 10 CL. & F. 154 at 191; 8 E.R. 700 at 716.

> "Expert evidence of this kind is evidence of persons who sometimes live by their business, but in all cases are remunerated for their evidence. An expert is not like an ordinary witness, who hopes to get his expenses, but who is employed and paid in the sense of gain, being employed by the person who calls him.
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> Now it is natural that his mind, however honest he may be, should be biased in favour of the person employing him, and accordingly we do find such bias ...
>
> Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. Accordingly we find in doubtful cases the most remarkable results ... the consequence is, you do not get fair professional opinion, but an exceptional opinion by (selected) evidence".[11]

8 In 1877:

> "... the opinion of an expert may be honestly obtained and it may be quite different from the opinion of another expert also honestly obtained. But the mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the court.
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> ... I have always the greatest possible distrust of scientific evidence of this kind, not only because it is universally contradictory, and the mode of its selection makes it necessarily contradictory, but because I know of the way in which it is obtained. I am sorry to say the result is that the court does not get the assistance from the experts, which if they were unbiased and fairly chosen, it would have a right to expect".[12]

9 These judicial opinions persisted into the 20th Century and in 1963 we find:

> "As to the evidence of the academically qualified scientists, a brief review of it will suffice because I cannot regard this of much assistance ... Professor X, Y and Z called for the defendant and Professor P for the plaintiff, are all learned and intelligent men, and I have no doubt that they have given their evidence honestly, although affected in greater or less degree by the kind of unconscious bias which is a well known characteristic of expert evidence."[13]

10 In 1986 we find:

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[11] *Lord Abinger v Ashton* (1873) 17 L.R. Eq. 358 at 374.
[12] *Plimpton v Spiller* (1877) 6 Ch.D. 412 at 416.
[13] *Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd* [1963] NSWR 737 at 753.

> "I am not usually impressed with the views of the other doctors ... on the basis that those views are almost inevitably slanted in favour of (the party) by whom they have been retained, consciously or unconsciously ... There are a number of doctors who it can confidently be assumed will express views upon a medico-legal basis, after being qualified for that purpose, which will assist and sometimes greatly extend the plaintiff's case and that some such doctors will go to extraordinary lengths in doing so."[14]

11 In 1992 it was observed that:

> "... it will be the experience of many, particularly ... in the 1960's and 1970's, that there were many judges on the bench who manifested an intense dislike of expert evidence ..."[15]

12 Non-judicial statements relating to this topic include in 1911:

> "There can be no doubt that testimony is daily received in our courts as "scientific evidence" to which it is almost profanation to apply the term; as being revolting to common sense, and inconsistent with the commonest honesty on the part of those by whom it is given."[16]

13 In 1937:

> "A good deal has been lost by allowing experts to be called by opposing sides. Naturally their views are coloured by the fact that they are witnesses called and paid for by A as opposed to B. Prejudice in such circumstances is one of the ills that flesh is heir to."[17]

14 In addition:

> "The testimony of experts is often considered to be of slight value, since they are proverbially, though perhaps unwittingly, biased in favour of the side which calls them, as well as over-ready to regard harmless facts, as confirmation of preconceived theories."

and:

> "Perhaps the testimony that least deserves credit with the jury is that of skilled witnesses ... it is often quite surprising to see with what facility and to what an extent their views can be made to

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[14] *Vakauta v Kelly* (1989) 167 CLR 568 at 581-582.
[15] Mr Justice Badgery-Parker, *Seminar on Expert Evidence: Practice Note* 70, in *Working with Experts and Experts' Reports* (1992) p.2.
[16] W.N. Best, *Principles of the Law of Evidence* (11th Ed., 1911).
[17] C.T. Moodie, *Expert Testimony - Its Past and Its Future* (1937) 11 *Australian Law Journal* 210 at 214.

> correspond with the wishes or the interests of the parties who call them."[18]

15 In 1976 the High Court said that "judicial silence" is the "counsel of perfection".[19] The dilemma of whether a trial judge should make statements during the trial indicating views about particular witnesses was appropriately exposed thirteen years later. The High Court respectfully disagreed with the application of the observation in relation to judicial silence to a trial judge sitting without a jury. It is quite proper for a trial judge who holds views about the reliability of certain evidence to disclose those views in the course of dialogue between Bench and Bar. This can facilitate the identification of the real issues and problems in a particular case. It is not proper, however, for a judge in disclosing his/her views to travel beyond that "ill-defined line" which will threaten the appearance of impartial justice.[20]

16 The expressions of opinion that have travelled beyond that "ill-defined line" have included statements by a judge describing three doctors who had regularly given evidence in his court as the "unholy trinity".[21] Other statements also included in that category were:

> "... his evidence is as negative as it always seems to be - and based as usual upon his non-acceptance of the genuineness of any plaintiffs complaints of pain ... The GIO's usual panel of doctors who think you can do a full weeks work without any arms or legs; whose views are almost inevitably slanted in favour of the GIO by whom they have been retained..."[22]

17 Some suggested that it was not fair to blame the expert witnesses because it was the lawyers who had forced the experts to adopt the role akin to that of an advocate.[23] It was said that it was not the experts' "own corruption" that caused their low repute but the circumstances in which the function had to be discharged – the adversary system. Others referred to

[18] *Phipson on the Law of Evidence* (9th Ed.) p.463; *Taylor on Evidence* (12th Ed.) p.59.
[19] *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 249 per Jacobs J.
[20] *Vakauta v Kelly* (1989) 167 CLR 568 at 571.
[21] *Vakauta v Kelly* (1989) 167 CLR 568 at 572.
[22] *Vakauta v Kelly* (1989) 167 CLR 568 at 572-573.
[23] G.J. Samuels, *Problems Relating to the Expert Witness in Personal Injury Cases* in H. Glass Ed. *Seminars on Evidence* (1970) p. 140.

the process as the "games of the lawyers, wherein there are both ladders and snakes".[24]

18 This potted history demonstrates that it was for well over 100 years that scepticism existed in relation to the way in which expert evidence was given.

Provenance of concurrent evidence

19 It was in 1992 that Sir Laurence Street AC KCMG QC developed a standard interlocutory direction in arbitrations and references because he concluded that the conventional adversarial procedure was not always well suited for the elucidation of contested issues involving expert opinion.[25] The development of the direction had the dual object of reducing the length of the conventional process and enabling the conflicting expert opinions as well as the reasons for that conflict to be more fully understood. Sir Laurence warned that it was not a direction to be arbitrarily imposed in every case but was to serve as a basis for discussion as to how best to approach the question of expert evidence. The direction included the following:

> (iii) at the hearing
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> (a) as each field of expertise arises for consideration each expert in that field will verify by affirmation his/her witness statement, the joint report and his/her annexure to the joint report. After these documents have been admitted into evidence all the expert witnesses in that field shall participate in a continuation of their meeting at which they will discuss with each other the matters of disagreement;
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> (b) for the purpose of such discussion the experts will be seated facing each other at a table placed between the arbitrator's/referee's table and the bar table;
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> (c) the discussion will be chaired by the arbitrator/referee who will guide the discussion and

[24] John Ellard, *Some Rules for Killing People* (1989) p 169.
[25] Sir Laurence Street, *Practice Note* (1992) 66 *Australian Law Journal* 861.

> will intervene with the object of the matters of disagreement being examined and analysed so as to enable the arbitrator/referee to reach a determination upon them;
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> (d) the representatives of the parties will be at liberty with the permission of the arbitrator/referee to intervene in the discussion and, prior to the arbitrator/referee reaching a determination on any matters of disagreement, they will be permitted to question the experts and make submissions to the arbitrator/referee.

20 This direction seems to be the precursor to the present concurrent evidence method.

Recent approach in New South Wales

21 The *Uniform Civil Procedure Rules* 2005 make no express mention of the procedure for expert evidence to be given concurrently. However there is ample reference to the evidence being given concurrently in the Practice Notes of the Supreme Court.[26] The recent changes to the approach in the procedure for expert evidence has been described as follows:[27]

> 134. The court can only engage in appropriate decision making if they have the assistance of professionals who are prepared to act as experts. That level of co-operation is highlighted and exemplified by the expert code of conduct to which experts now adhere when giving evidence. Most particularly, the expert witness now has an overriding duty to assist the court impartially and his or her duty is to the court and not to any party.
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> 135. The effect of the implementation of the expert code of conduct is that a form of scientific discourse usually occurs in court, the primary purpose of which is to provide the judge with relevant expert material to enable him or her to appropriately decide a case. That evidence is conventionally placed before the court by means of questions addressed to the expert by counsel or by the judge. That is why experts are treated somewhat differently to other witnesses and leading questions can be put to them. It also explains why yes/no answers are often inappropriate and why answers that may not be immediately responsive are allowed if the expert is genuinely seeking to answer that which the questioner is

[26] SC CL5 paragraphs 36-40; SC CL7 paragraph 35(c); SC Eq 1 Annexure A paragraph 4; SC Eq 3 paragraphs 54 and 55.
[27] *Hawkesbury District Health Service Limited and Anor v Patricia Chaker* [2010] NSWCA 320.

> asking. Of course with concurrent evidence the dialogue is often directly between the experts themselves or the expert and the judge.
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> 136. The achievement of such an instructive discourse is not helped by a confrontational approach by the parties and their legal advisers. Such an approach wastes time and interferes with the facilitation of a just, quick and cheap resolution of the real issues in the proceedings as required by s 56 of the *Civil Procedure Act* 2005.

22 The concurrent evidence procedure has been applauded as allowing those who were shy or indifferent to contribute to a structured discussion and to enable experts to more clearly communicate their opinions by responding to the views of other experts. It has also been suggested that it enables the judge to observe the experts in conversation with one another, asking and answering questions amongst themselves.[28] It has been said that the experts and their professional organisations have "overwhelming support" for the process of concurrent evidence.[29]

23 The expert's duty to the court is paramount irrespective of the contractual arrangement between the expert and the party by whom the expert is retained and irrespective of the duty of care owed by the expert to the party by whom the expert is retained. This duty has been imposed within a system in which there presently exists immunity for experts against suit for negligence in respect of their expert assistance to the Court.

Expert's immunity from suit

24 The immunity originally took the form of an absolute privilege against a claim for defamation and extended to all who took part in legal proceedings. It was a privilege that was extended in the form of immunity from suit to other forms of action in tort.[30] It was described by the Earl of Halsbury LC in *Watson v M'Ewan* [1905] AC 480 at 488-489 as follows:

> I do not care whether he is what is called a volunteer or not; if he is a person engaged in the administration of justice, on whichever

[28] Mia Louise Livingstone, *Have we fired the "hired gun"? A critique of expert evidence reform in Australia and the United Kingdom* (2008) 18 *Journal of Judicial Administration* 39 at 51.
[29] Justice P McClellan, *Sworn together the discussion of concurrent evidence* (2009) 93 *Precedent*.
[30] *Jones v Kaney* [2011] UKSC 13 at [11]-[12] per Lord Phillips.

side he is called his duty is to tell the truth and the whole truth. If he tells the truth and the whole truth, it matters not on whose behalf he is called as a witness; in respect of what he swears as a witness he is protected – that cannot be denied – and when he is being examined for the purpose of being a witness he is bound to tell the whole truth according to his views, otherwise the precognition, the examination to ascertain what he will prove in the witness box, would be worth nothing.

25 There was a challenge as to the extent of that immunity in 1992[31] in which it was held that the immunity would only extend to what could fairly be said to be work which was preliminary to giving evidence in court. Work done principally for the purpose of advising the client was not covered.

26 In *Stanton v Callaghan* [2000] QB 75 Chadwick LJ said at 100-102:

(i) an expert witness who gives evidence at a trial is immune from suit in respect of anything which he says in court, and that immunity will extend to the contents of the report which he adopts as, or incorporates in, his evidence;

(ii) where an expert witness gives evidence at a trial the immunity which he would enjoy in respect of that evidence is not to be circumvented by a suit based on the report itself; and

(iii) the immunity does not extend to protect an expert who has been retained to advise as to the merits of a party's claim in litigation from a suit by the party by whom he has been retained in respect of that advice, notwithstanding that it was in contemplation at the time when the advice was given that the expert would be a witness at the trial if that litigation were to proceed. What, as it seems to me, has not been decided by any authority binding in this court is whether an expert is immune from suit by the party who has retained him in respect of the contents of a report which he prepares for the purpose of exchange prior to trial – say, to comply with directions given under RSC, Ord 38, r 37 – in circumstances where he does not, in the event, give evidence at the trial; either because the trial does not take place or because he is not called as a witness.

…

In my view the public interest in facilitating full and frank discussion between experts before trial does require that each should be free to make proper concessions without fear that any departure from advice previously given to the party who has retained him will be

[31] *Palmer v Durnford Ford* [1992] QB 483.

> seen as evidence of negligence. That, as it seems to me, is an area in which public policy justifies immunity. The immunity is needed in order to avoid the tension between a desire to assist the court and fear of the consequences of a departure from previous advice.

The immunity abolished in the UK

27 On 30 March 2011 the Supreme Court of United Kingdom (Lord Hope and Lady Hale dissenting) abolished the immunity previously enjoyed by expert witnesses.[32] The case arose out of a motorcycle rider (the appellant) being knocked down by a driver who was drunk, unlicensed and driving whilst disqualified. The appellant suffered significant physical injuries and psychiatric consequences. He instructed solicitors who then instructed an orthopaedic surgeon and a clinical psychologist. The clinical psychologist provided a report in 2003 indicating, amongst other things, that the appellant was suffering from a post traumatic stress disorder (PTSD). After receiving this report, the appellant commenced proceedings against the driver and the insurer admitted liability. The only question for the court was that of quantum.

28 After proceedings were commenced the clinical psychologist produced a second report which included the opinions that the appellant was not then suffering from all the symptoms that would warrant a diagnosis of PTSD, but that he was still suffering from depression and some of the symptoms of PTSD. The insurer instructed a clinical psychologist whose report included the opinion that the appellant was exaggerating his symptoms.

29 A district judge ordered that the two experts hold discussions for the purpose of producing a joint statement. The two experts held telephone discussions and the insurer's expert drafted the joint statement which was signed by the appellant's expert. It was damaging to the appellant's claim. It suggested that the appellant was suffering no more than an adjustment reaction and that he was not suffering a real level of depression nor PTSD. It was also noted that the insurer's expert had formed the view that the

[32] *Jones v Kaney* [2011] UKSC 13.

appellant was deceptive and deceitful in reporting his symptoms. The experts agreed that the appellant was utilising what was referred to as a "conscience mechanism" that raised doubt about his symptoms.

30 Not surprisingly the appellant's expert was questioned by the appellant's solicitors about the difference between the opinion that was expressed in the previous reports and the opinion that was expressed in the joint statement. The appellant's expert gave a number of explanations including that: she had not seen the reports of the opposing expert at the time of the telephone conference; the joint statement as drafted by the opposing expert did not reflect what she had agreed to in the telephone conference but that she had felt under some pressure to agree to it; her true view was that the appellant had been "evasive" rather than "deceptive"; and it was her view that the appellant had suffered from PTSD but that it had by that stage resolved.

31 The appellant's solicitors sought permission from the court to change their psychiatric expert but this application was refused. The appellant claimed that his solicitors were then constrained to settle his claim for significantly less than the settlement that would have been achieved had the expert not signed the joint statement. The appellant the commenced proceedings in negligence against the expert which were struck out. However because the case involved a point of law of general public importance the appeal was brought directly to the Supreme Court of the United Kingdom.[33]

32 After reviewing the authorities in relation to the history of the immunity referred to above, Lord Phillips dealt with a number of issues relating to whether the continuation of the immunity was justified. The first issue was the purpose of the immunity. After noting the emphasis in the *Civil Procedure Rules* 1998 (UK) (CPR) on the paramount importance of the duty of an expert to give frank and objective advice to the court, it was observed that the purpose of the immunity was to enable experts to have the reassurance that if they complied with their obligation to the possible

disadvantage of their clients they would not be at risk of being sued for failing to have regard to their clients' best interests.

33 In dealing with the scope of the immunity Lord Phillips suggested that the requirement identified by Otton LJ in *Stanton v Callaghan* that an expert must be able to resile fearlessly and with dignity from a more extreme position taken in an earlier advice, could present "a paradox". His Lordship described the paradox in this way:[34]

> The expert might be reluctant to do this through fear of conceding that his earlier advice had been erroneous. In that event he needed protection, not in respect of his revised view, but in respect of his earlier advice. Yet, … the earlier advice might not be covered by the immunity.

34 On the question of whether the immunity had been eroded by cases in which expert witnesses' conduct was not protected against disciplinary proceedings or orders for wasted costs, Lord Phillips concluded that these examples did not weaken the case for immunity from civil suit. His Lordship noted that the principal argument advanced for immunity from civil suit was that the risk of being sued would deter the expert witness from giving full and frank evidence in accordance with the expert's duty to the court when it conflicted with the interests of the client.[35]

35 Lord Phillips also dealt with a comparison between expert witnesses and advocates and said:[36]

> There was a time when it might have been possible to argue that there was a difference between the duty owed by an expert witness to the client who retained him and a conflicting, and overriding, public duty owed by the expert when giving evidence in court; but the former obliged the expert to put forward the best case for his client whereas the latter involved a duty to be candid, even at the expense of his client. The existence of such a difference is implicit in the provision of CPR 35.3 which states that it is the duty of experts to help the court with matters within their expertise and that this duty *overrides* any obligation to the person

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[33] This process was by "leap frog certificate" under section 12 of the *Administration of Justice Act* 1969 (UK).
[34] At [42].
[35] At [44].
[36] At [47].

> from whom the experts have received their instructions or by whom they are paid. Such a distinction lends force to the argument that, once the expert is providing evidence to the court, or preparing to do so, he is no longer bound by a duty to his client and thus cannot be held liable for breach of such a duty.

36 After reference to the analogous provisions in the CPR to our Code of Conduct his Lordship observed that the expert agrees with the client that the expert will perform the duties owed to the court and concluded "thus there is no conflict between the duty that the expert owes to his client and the duty that he owes to the court."[37] His Lordship also said:[38]

> Thus the expert witness has this in common with the advocate. Each undertakes the duty to provide services to the client. In each case those services include a paramount duty to the court and the public, which may require the advocate or the witness to act in a way which does not advance the client's case. The advocate must disclose to the court authorities that are unfavourable to his client. The expert witness must give his evidence honestly, even if this involves concessions that are contrary to his client's interests. The expert witness has far more in common with the advocate than he does with the witness of fact.

37 In considering whether the removal of the immunity would have the "chilling effect" of expert witnesses being reluctant to give evidence, Lord Phillips concluded that such a claim was not made out.[39] His Lordship asked the following question:

> Why should the risk of being sued in relation to forensic services constitute a greater disincentive to the provision of such services than does the risk of being sued in relation to any other form of professional services?

38 Lord Phillips was not satisfied that this was a matter that would justify the retention of the immunity. In dealing with whether the immunity was necessary to ensure that expert witnesses give full and frank evidence to the court, his Lordship said:[40]

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[37] At [49].
[38] At [50].
[39] At [54].
[40] At [56].

> As expert witnesses have, to date, had the benefit of immunity, how they will behave if that immunity is removed must be a matter of conjecture or, more accurately, reasoning. … An expert's initial advice is likely to be for the benefit of his client alone. It is on the basis of that advice that the client is likely to decide whether to proceed with his claim, or the terms on which to settle it. The question then arises of the expert's attitude if he subsequently forms the view, or is persuaded by the witness on the other side, that his initial advice was over-optimistic, or that there is some weakness in his client's case which he had not appreciated. His duty to the court is frankly to concede his change of view. The witness of integrity will do so. I can readily appreciate the possibility that some experts may not have that integrity. They will be reluctant to admit to the weakness in their client's case. They may be reluctant because of loyalty to the client and his team, or because of a disinclination to admit to having erred in the initial opinion. I question, however, whether their reluctance will be because of a fear of being sued – at least a fear of being sued for the opinion given to the court. An expert will be well aware of his duty to the court and that if he frankly accepts that he has changed his view it will be apparent that he is performing that duty. I do not see why he should be concerned that this will result in his being sued for breach of duty. It is paradoxical to postulate that in order to persuade an expert to perform the duty that he has undertaken to his client it is necessary to give him immunity from liability for breach of that duty.

39 Having said this Lord Philllps then referred to a lesson that had been learnt from the position of barristers and the fact that the removal of their immunity had not resulted in any diminution of the advocate's readiness to perform their duty to the court. His Lordship concluded that it would be "quite wrong" to perpetuate the immunity of expert witnesses out of mere conjecture that they will be reluctant to perform their duty to the court if they are not immune from suit for breach of duty.

40 In justifying his view that expert witnesses would not be harassed by vexatious claims for breach of duty Lord Phillips said:[41]

> Where, however, a litigant is disaffected because a diligent expert has made concessions that have damaged his case, how is he to get a claim against that expert off the ground? It will not be viable without the support of another expert. Is the rare litigant who has the resources to fund such a claim going to throw money away on proceedings that he will be advised are without merit? The litigant without resources will be unlikely to succeed in persuading lawyers

[41] At [59].

> to act on a conditional fee basis. A litigant in person who seeks to bring such a claim without professional support will be unable to plead a coherent case and will be susceptible to a strike out application. For these reasons I doubt whether removal of expert witness immunity will lead to a proliferation of vexatious claims.

41 On the other hand a litigant who is disaffected because the case has been damaged by the expert's concession may have reasonable grounds for bringing an action because there was no indication prior to the witness going into the witness box and making the concessions that there was any prospect of such a concession being made. Additionally experience tells us that litigation funders are available to litigants and in the circumstances that I have just described advice may not be given that the case is without merit. There is also the litigant in person who is more sophisticated than those described by Lord Phillips. Many of the litigants who are unrepresented are able to put forward claims that are not totally incoherent.

42 Lord Phillips considered that the immunity from suit for breach of duty that expert witnesses had enjoyed in relation to their participation in legal proceedings should be abolished.[42]

43 Lord Brown agreed that the immunity should be abolished[43] and expressed the opinion that the most likely broad consequence of its abolition would be the experts' "sharpened awareness of the risks of pitching their initial views of the merits of their client's case too high or too inflexibly less these views come to expose and embarrass them at a later date."[44] His Lordship welcomed this as a "healthy development" in the approach of the expert witnesses' ultimate task of assisting the court to reach a fair outcome of the dispute or assisting the parties to a reach a reasonable pre-trial settlement.[45]

[42] At [62].
[43] At [63]-[69].
[44] At [67].
[45] At [67].

Lord Collins also agreed that the immunity should be abolished. He traced the recent history in other parts of the world and in particular the United States of America identifying Washington as the only state to uphold the immunity. Lord Collins also referred to a number of Australian cases. After referring to the High Court's re-affirmation of the general witness immunity in *D'Orta-Ekenaike v Victoria Legal Aid*[46], his Lordship referred to three cases involving experts. The first was *Sovereign Motor Inns Pty Limited v Howarth Asia Pacific Pty Ltd*[47] in which the plaintiff had been unsuccessful in equity proceedings in part because its expert's report had a number of flaws and was mainly inadmissible. That party then sought to bring proceedings against the expert and Master Harrison, as Associate Justice Harrison then was, analysed many of the authorities that have been referred to in *Jones v Kaney* concluding that the action should be dismissed because the expert was protected by the immunity.

44 The second case referred to by Lord Collins was *James v Medical Board of South Australia*.[48] In that case the medical practitioner was seeking to restrain the Medical Board from proceeding with the a hearing in respect of alleged unprofessional conduct because part of the conduct arose out of what he had said as an expert witness. The Court (per Bleby and Anderson JJ) held that although the medical practitioner was immune from suit in so far as his evidence could not be challenged in another process, he was accountable to his professional peers when a member of the public made a complaint of unprofessional conduct.[49] The medical practitioner could not use the witness immunity to prevent disciplinary proceedings being brought against him.

45 The third Australian case referred to by Lord Collins was *Commonwealth of Australia v Griffiths*.[50] In that case a person had been convicted on the basis of a certificate produced by an expert analyst recording the nature of

[46] (2005) 223 CLR 1; [2005] HCA 12 [39].
[47] [2003] NSWSC 1120.
[48] (2006) 95 SASR 445.
[49] At [84].
[50] (2007) 70 NSWLR 268.

a prohibited substance found in his possession. That conviction was overturned on appeal and an acquittal was entered. Proceedings were then brought against the Commonwealth Laboratory and the analyst who signed the certificate. At first instance the case against the analyst was dismissed by reason of the existence of witness immunity and the case against the laboratory was allowed to stand. On appeal to the Court of Appeal, after a review of the relevant authorities, including many of those referred to in *Jones v Kaney* it was held that the immunity applied to protect both the analyst and the Commonwealth Laboratory from suit.[51] Lord Collins did not analyse these cases and referred to them only as being cases of actions against adverse experts or independent experts, except for *Sovereign Motor Inns* to which he made no further reference.

46 His Lordship concluded that there were no longer any policy reasons for retaining the immunity and expressed the opinion that a conscientious expert would not be deterred by the danger of civil action by a disappointed client any more than the same expert would be deterred from providing services to any other client. He concluded that the removal of the immunity would tend to ensure a greater degree of care in the preparation of the initial report or the joint report.[52]

47 Lord Kerr also agreed that the immunity should be abolished noting that there was nothing to support the assumption that conscientious witnesses would behave discreditably by modifying their opinions from those they truly held because they feared that an aggrieved client might "unwarrantably" seek redress against the expert. His Lordship said:[53]

> If an expert expresses an honestly held view, even if it differs from that which he may have originally expressed provided it is an opinion which is tenable, he has nothing to fear from a disgruntled party.

[51] At [122] per Beazley JA with whom Mason P and Young CJ in Eq (and his Honour then was) agreed.
[52] At [85].
[53] At [93].

48 This observation must be viewed in the light of the concurrent evidence regime that fosters discussion and movement in views whilst opposing experts are giving evidence together. It may well be that the opinion expressed in the witness box is tenable and honest. It may well be that the witness expressed a tenable and honest view in the previous report but because of material that was provided or opinions expressed in a particular way in the volatility of the concurrent session, the witness expresses a different view. Although his Lordship suggested there would be nothing to fear from a disgruntled party, there may well be something to fear if the disgruntled party had no idea of the prospect of a change in view in this process.

49 Lord Dyson also agreed that the immunity should be abolished. His Lordship said that the mere fact that it was long established was not a sufficient reason for "blessing it with eternal life" and suggested that the history of the rise and fall of the immunity of advocates provided a vivid illustration of the point. [54]

50 In dissent Lord Hope said that the purpose of the immunity was to ensure that witnesses were not deterred from coming forward to give evidence in court and from feeling completely free to speak the truth without facing the risk of being harassed afterwards by actions in which allegations are made against them in an attempt to make them liable in damages.[55] His Lordship referred to this as a "fundamental principle" and also expressed concern that "an incautious removal" of the immunity from one class of witness risked destabilising the protection that is given to witnesses generally.[56] His Lordship also observed that the privilege existed for the protection of all witnesses, not just the few against whom successful actions might otherwise be brought for an award of damages.[57] His Lordship said:[58]

[54] At [112].
[55] At [130].
[56] At [131].
[57] At [136].
[58] At [144].

> It is the need for certainty that also makes it necessary to extend the protection of the rule to all witnesses and to all causes of action that may be brought against them. The rough is taken with the smooth. There will be some cases where a genuine cause of action is excluded by it. But in the vast majority of cases it is the assurance of the protection that enables people against whom no action could reasonably be brought to speak freely without facing the prospect of being harassed by those against whose interests they have spoken.

51 After analysing the reasons of the majority his Lordship said:[59]

> The lack of a secure principled basis for removing the immunity from expert witnesses, the lack of a clear dividing line between what is to be affected by the removal and what is not, the uncertainties that this would cause and the lack of reliable evidence to indicate what the effects might be suggest that the wiser course would be to leave matters as they stand … If there is a need to reform the law in this area, it would be better to leave it to be dealt with by Parliament following a further report by the Law Commission.

52 Lady Hale also dissented expressing the view that it would be impossible to confine any exception to a particular class of case and concluded:

> 189. The major concern, however, is not about the effect of making the exception upon expert witnesses. If they are truly expert professionals, they should not allow any of this to affect their behaviour. The major concern is about the effect upon disappointed litigants. I agree with Lord Hope that the object of the rule is to protect all witnesses, the great majority of whom are trying to do a professional job and are well aware of their duties to the court, against the understandable but usually unjustifiable desire of a disappointed litigant to blame someone else for his lack of success in court.
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> 190. For these reasons it does not seem to me self-evident that the policy considerations in favour of making an exception to the rule are so strong that this Court should depart from previous authority in order to make it. To my mind, it is irresponsible to make such a change on an experimental basis. This seems to me self-evidently a topic more suitable for consideration by the Law Commission and reform, if thought appropriate, by Parliament rather than by this Court.

[59] At [173].

53 Much of the analysis of the majority in *Jones v Kaney* focuses on the likelihood or otherwise of experts being reluctant to give evidence should the immunity be removed. Indeed the example of the removal of the immunity from barristers with no adverse consequences for the administration of justice seems to have provided some comfort to those in the majority in the removal of the immunity from experts. This comparison may appear to be "paradoxical",[60] to use an expression favoured by Lord Phillips in his analysis, particularly when the Code of Conduct exhorts experts not to take on the role of an advocate.

54 A matter of significance to the system in this country, in particular in this State, is the observation made by Starke J in *Cabassi v Vila*[61] that "the law protects witnesses and others, not for their benefit, but for the higher interest, namely, the advancement of public justice." The "higher interest" in this regard is the capacity for the Court to receive expert assistance on issues that are beyond its competence to decide. When judges engage with experts openly and freely in concurrent session to explore their own views of the issues, it is necessary for witnesses who might by answering the judge honestly not to be in fear of being sued for failing to anticipate the question and the answer that would be adverse to the client's case. If a witness is so fearful, the reputation of the system may be returned to that which existed in the days referred to at the outset of this paper. The maintenance of the immunity is thus for the "higher interest", not merely for the protection of the witness from suit.

55 One practical consequence of the removal of the immunity for experts and/or legal practitioners is that when giving advice to a client of the prospects of success of a case based on a favourable expert report it will be necessary to ensure that the client is aware that notwithstanding the expert's expressed view in support of the client's case, there could be a dilution of that view or even a change to that view as a result of either discussion with the trial judge or with the peer called in the same

[60] At [56].
[61] (1940) 64 CLR 130 at 141.

concurrent session. It would be necessary to ensure that the client understood that although the prospects of success seemed real there may a change to that position having regard to the process of concurrent evidence.

56 Another interesting situation may arise in circumstances not dissimilar to a case in recent years in the New South Wales jurisdiction. In that case a woman attended a breast screen service provided by an Area Health Service in New South Wales.[62] The radiologists misdiagnosed the patient and failed to recall her for further review. Sadly the plaintiff had a tumour that metastasized and she died after the trial (in her favour) and before the appeal (in the Area Health Service's favour). The individual radiologists were not sued but gave evidence. One of the questions on appeal was the admissibility of the radiologists' evidence not as to the fact of what occurred at the time they saw the films originally but of an expert nature of reading the films subsequently at the time of trial and forming an expert opinion as to what they saw. The trial judge had rejected this expert evidence on the basis that it was ex-post facto justification and not admissible. The Court of Appeal disagreed with that finding and returned the matter to the trial division for a new trial.

57 In this example, if the immunity for expert witnesses were to be removed, the radiologists could not be sued for the evidence they gave of the facts of looking at the film at the time but could be pursued in respect of the evidence they gave of viewing the films some years later and applying an expert opinion to it. This may seem rather unsatisfactory. Indeed the criticisms made by Lord Hope and Lady Hale of the removal of the immunity and the consequent uncertainties may present as persuasive in favour of its retention. However if it were to be removed then I suggest that consideration might be given to the proposal referred to below.

[62] *Sydney Southwest Area Health Service v Stamoulis* [2009] NSWCA 153.

A proposal for thought

58 One way of diluting the problem would be by establishing panels of experts in the various specialities by consultation between the courts, members of the professions and the relevant colleges and professional associations. Where the relevant specialty is not accredited, it may be appropriate to consult with the universities or trade colleges in this regard. The colleges or professional associations would establish the panels, with a system of rotating those who serve on the panels, say, on an annual or bi-annual basis. When an issue arises in litigation upon which the court will require expert assistance a witness or witnesses in the relevant speciality could be drawn by ballot (or some other method) from the panel. The expert or experts so drawn would then provide the relevant reports, take part in the relevant meetings and give concurrent evidence, if that process is appropriate in the particular case. There is also the need to consider the necessity for pre-litigation advice. It may be worth considering a pre-litigation panel consisting of experts who are willing to provide advice on the merits of particular cases.

59 A fund could be established for payment to the expert with appropriate contribution by the parties but administered by the association or some independent body so that the witness is not toxified with payments from the party directly. To ensure that the expert is permitted to maintain the right to charge a proper fee for expert assistance, the mechanism for payment into the fund and payment out to the expert would need careful refinement.

60 Features of such a system include that the party would not choose the expert but merely the expertise and the party relying upon the expert's opinion will not make direct payment to the expert. This will dilute the propensity of the witnesses to be labelled as a "plaintiff's" or "defendant's" witness and enhance the concurrent evidence process. The aim is to establish a regime in which the expert's only duty is that owed to the Court to assist it on a question or issue beyond its competence, rather than to

boost the prospects of a particular party's success. May I suggest thought be given to this embryonic proposal.

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