

Contemporary Challenges For The Justice System – Expert Evidence

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CONTEMPORARY CHALLENGES FOR THE JUSTICE SYSTEM – EXPERT EVIDENCE

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

Challenges for the adversarial system of justice

Writing in 1999 Sir Anthony Mason addressed the future of the adversarial system in the Australian legal landscape. Although he recognised that problems in the system had been identified he nevertheless concluded that many improvements had been made. He emphasised that the courts stand ready “to make further changes once it is established that they are desirable.” [1]

A review of the work of Law Reform Commissions and other Inquiries into the justice system reveals the concern of those responsible for administering civil justice to ensure that the court processes meet contemporary needs. Although problems had previously been talked about the latter part of the 20th century brought a determination to try and find solutions. The impetus for change in the justice system in common law jurisdictions came at the same time as changes were occurring in the broader community. The acceptance of the need in all areas of government to review the conventional methods of providing services was matched by changes in the disposition and management of resources in the private sector.

There are many factors at work. The increase in available knowledge and the capacity for its instantaneous communication has meant the rapid distribution of ideas diminishing the opportunity for complacency about the existing order. There is now a greater and increasing demand for efficiency in the management of assets, both in the public and private sector. This has stimulated greater flexibility in the structure and management of major enterprises. This flexibility has been both the product of change and has become the driver of further change. It has required individuals to adapt, diminishing their security of employment, and requiring many to meet new challenges. The changes have initiated processes which are redistributing wealth at both a national and international level.

It was inevitable in this environment that the legal system would also come under scrutiny. Although not amenable to the process of conventional audit, judgments about the efficiency and the effectiveness of the process have increasingly been made. [2] The process of change in the public sector is not complete. And there is no reason to believe that pressure for change to the legal system will not continue.

There are many issues. The label “proportionality” is commonly used to identify the attributes of an effective system of justice. It refers to a system which allocates resources for the resolution of a dispute in proportion to the significance of the dispute to the parties and the community. Although there is sometimes difficulty in defining its content there is no doubt about the problems which are sought to be addressed. The process of the system of justice which we have inherited is not easily adapted to resolving a dispute between the parties where relatively small or even modest amounts are in dispute. Our procedures are complex and often impose costs to the State and the parties which are considered by many people to be unreasonable.

The development of the law of negligence during the 20th century contributed greatly to the growth of civil litigation in the courts. Described by Hayne J as the “imperial march of negligence” [3] both the widespread use of motor vehicles and the development of major manufacturing enterprises provided opportunities for injuries to individuals which the community accepted justified monetary compensation. Given the value which our society places upon the rights of individuals the law recognised an entitlement to damages when a person was injured by the careless actions of another. Compensation in the form of monetary damages was ordered by courts and insurance funds were

created to share the financial burden amongst groups of individuals or corporations. Although other mechanisms were possible, disputes were traditionally heard in the courts which, under our system, utilise an adversarial process to resolve questions of liability and damage.

The latter part of the 20th century has seen a questioning of the assumptions we have made about the advantages of the adversarial system. In some significant areas that questioning has resulted in fundamental change with the adversarial approach being abandoned. Both when injuries are sustained as a result of a motor vehicle accident and where a person is injured at work, the NSW government has legislated to define the entitlement to damages. Where there is a dispute the conventional courts have been either partly or wholly abandoned. In many cases the decision-maker will not be a lawyer. The use of persons with expertise related to the injured person's problem is more likely. [4]

In other areas it is no longer the case that "justice" is administered only by judges. It is commonly provided or facilitated by commissioners, referees, tribunal members, arbitrators, mediators or experts whom the parties choose to resolve their problems. The creation of these alternate resolution processes are a response to the cost, formality and perceived unsuitability of the conventional system. They have often been created out of a recognition that it is preferable to have the dispute resolved by a person with expertise relevant to that dispute rather than by a court which lacks that expertise. An expert in the field comes to the dispute with the learning and experience lacked by a judge. Although the application of the rules may still be supervised by judges, primary decision-making is commonly given to a person who may not be a judge but who, the community accepts, is best suited to carry out the task.

Problems with experts

I have previously written that the "effective and fair use of the learning of others in the resolution of disputes is one of the most significant issues which the courts face." [5] The development of alternative, non-judge, dispute resolution bodies reflects a community perception that courts may not be the most efficient or effective means of resolving disagreements where areas of expert learning are relevant. Unless courts, their judges and the legal profession effectively address these issues, their relevance as decision-makers will continue to be questioned and their role further confined.

I first encountered the concern of experts about the resolution of their controversies by judges when I was counsel assisting the Royal Commission into British nuclear tests in Australia. The issues in that Inquiry were many and complex. One of them required an understanding of the present status of a large area of central Australia polluted by plutonium waste. Once the status was established a solution which could provide a sustainable and permanent solution to the identified problems had to be generated. The radiation scientists were troubled that those decisions were given over to a judge. The same Inquiry was required to examine the impact of ionising radiation on the health of the many military personnel who may have been exposed to it. This required an understanding of the relevant medicine, including an analysis of the available epidemiological studies of the nuclear explosion at Hiroshima and Nagasaki. Again the scientists questioned why it was that lawyers were assumed to be the best people to resolve disagreements between scientists.

One of the major issues for the Commission was whether the major explosions had been detonated in appropriate meteorological conditions. The meteorologist responsible for some of the tests had since become the chief meteorologist for the United Kingdom. The task of investigating his earlier actions and challenging the correctness of decisions which he made was entirely beyond the experience of any person involved in the Inquiry. The Commission reported criticism of one of his decisions which allowed part of the nuclear "cloud" to pass over the city of Adelaide. Although the Commission was required to express this opinion I can understand the disquiet of meteorologists about judgment being passed on their actions by persons without any qualifications or experience in that area.

Since the early report of Lord Woolf H K Woolf, [6] contemporary recognition of problems with the integrity of expert evidence placed before courts has been the subject of considerable discussion. In late 1998 the Australian Federal Court introduced rules and a practice direction to try and deal with these problems. [7] The New South Wales Supreme Court responded by introducing an "Expert witness code of conduct" in Schedule K and corresponding changes to Pt 36 r 13C of the Supreme Court Rules 1970 in January 2000. As of 15 August 2005, the equivalent provisions and code of conduct are embodied in the Uniform Civil Procedure Rules. [8] Since its inception Pt 31 of the UCPR has provided for court-appointed experts and as of 8 December 2006 parties may appoint a joint single expert. [9] Other courts have undertaken similar measures. [10] The responses have involved a number of initiatives. Lord Woolf introduced the concept of a single expert including court-appointed experts. Controls have been imposed on the number of experts which the parties may call. Courts

have required experts to meet and discuss their opinions in advance of the trial in order to make the most efficient use of court time and refine the issue or issues which the court must resolve. Experts have been required to acknowledge that their primary duty is to the court and not a party. Many of these changes have been controversial. For many people these changes are seen as an unwarranted intrusion on the rights of an individual to litigate under the adversarial system. For example, in the wake of the Woolf Reforms in the United Kingdom, one English judge has said that: "If the expert evidence goes to the central issue in the case, the use of a sole expert may be tantamount to having a trial by expert. Courts are meant to be in the business of providing access to justice not handing over the keys of the business to the experts." [11] Just as case management was seen as an unjust constraint upon a party's rights, confining a party's opportunity to call an expert or experts was viewed as contrary to the right to a fair trial. It may be that those who express opposition to these changes do so without recognising that many of the changes of forum, to which I have earlier referred, are a direct result of the perceived failure of the adversarial system – to provide an effective decision at an acceptable price.

Notwithstanding the efforts which have been made at reform, it is still commonplace to hear complaints directed to the use of experts in the litigation process. Apart from the integrity of expert evidence, a common complaint is the cost of the expert which is often, at least in part, a product of the time which he or she must spend in court. Increasingly, the question is asked whether the courts, judge and/or jury are capable, without their own expert advice, of making decisions about complex scientific, medical, engineering or other issues. These are questions which cannot be ignored. Effective responses require a preparedness to reconsider, not only the peripheral, but some of the fundamental elements of our present system of dispute resolution.

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

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

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

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

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

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

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

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

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

To my surprise the engineer who spoke after me, having explained how he conventionally approached his task of gathering evidence, preparing his report and handling the "dangers" of oral evidence, finished with a flourish saying "and of course at the end of the day your fundamental obligation is to do the best you can for your client." Although the discussion which followed was lively, I doubt whether the engineer understood, much less accepted, the error in his approach.

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

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

Concerns of the AMA

Dr Martin Nothling has expressed the dissatisfaction felt by many medical practitioners in relation to the way medical evidence has traditionally been received in court. He said this:

"The Australian Medical Association and its members have had an increasing interest in this field for many years, with the level of interest reaching a high point with the medical indemnity crisis in 2002. With the build-up to the medical indemnity crisis, expert medical evidence, legal processes and judgments in public liability and medical negligence cases became an increasing focus for medical practitioners in Australia ... There was a widespread concern amongst medical practitioners that sound medical scientific principles did not seem to carry relevant weight in medical negligence Court cases and that at times maverick opinions from those who were considered to be hired guns, seemed to be the favoured evidence. As a member of the Federal Council of the Australian Medical Association during that time and up to the current time, I can attest to the intensity of feelings expressed by doctors on these issues.

... There is wide concern in the medical community with regards to the adversarial processes involved in obtaining our opinions. There is a wide perception in the medical profession that important medical principles and reasoning often does not seem to be understood by Courts. For that reason, many medical practitioners have stated categorically that they will not be involved in providing expert medical evidence in such settings. There is concern that the medical issues are handled in a manner which makes it difficult for them to provide an accurate account in order to properly inform the Court. The doctors are interested in seeing improved expert witness processes in order that Courts and Tribunals receive properly informed and quality expert opinion ... Doctors feel that the Courts are sometimes misled into making wrong decisions as a result of hired gun or biased expert opinions being presented and not properly tested." [12]

Concurrent evidence

Apart from the responses to the problem, mostly derived from Lord Woolf's reforms to which I have earlier referred, some Australian courts have moved to significantly alter the method by which expert evidence is received. Referred to as "concurrent evidence" a procedure has developed in which the experts are provided with an opportunity to contribute their learning and experience to assist the court to resolve issues in an environment where there is a diminished obligation to a party, and the sometimes artificial constraints imposed by the adversarial process are avoided.

How does it work? Although there may be variations made to meet the needs of a particular case concurrent evidence requires the experts retained by the parties to prepare a written report in the conventional fashion. The reports are exchanged and, as is now commonly the case in many courts, the experts are required to meet to discuss those reports. This may be done in person or by telephone. Concurrent evidence requires the experts to prepare a short point document which incorporates a summary of the matters upon which they are agreed but more significantly matters upon which they disagree. The experts are sworn together and using the summary of matters upon which they disagree the judge settles an agenda with counsel for a discussion of the issues which require resolution. The judge then chairs that discussion ensuring that an opportunity is provided for each expert to place their view before the court on a particular issue or sub-issue. The experts are encouraged to ask and answer each others questions. Counsel may also ask questions during the course of the discussion being questions which are designed to ensure that an expert's opinion is fully articulated and where necessary challenged by a contrary opinion. At the end of the process the judge will ask questions to ensure that all of the experts have had the opportunity of fully explaining their position.

I have utilised the process of concurrent evidence on many occasions, both when I was in the Land and Environment Court, and in the Supreme Court. I have also had the opportunity of speaking with many witnesses who have been involved in the process and with counsel who have appeared in cases where it has been utilised. Although counsel are often hesitant before being involved in the process I have heard little criticism once they have experienced it.

Experience shows that provided everyone understands the process at the outset, in particular that it is to be a structured discussion designed to inform the judge and not an argument between the experts and the advocates, there is no difficulty in managing the hearing. Although I do not encourage it, very often the experts, who will be sitting next to each other, end up referring to each other on first name terms. Within a short time of the discussion commencing, you can feel the release of the tension which normally infects the evidence gathering process. Those who might normally be shy or diffident are able to relax and contribute fully to the discussion.

This change in procedure has met with overwhelming support from the experts and their professional organisations. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively respond to the views of the other expert or experts. They believe that there is less risk that their evidence will be distorted by the advocate's skill. It is also significantly more efficient. Evidence which may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as 20% of the time which would have been necessary.

I have had cases where eight witnesses gave evidence at the one time. There have been many cases where four experts have given evidence together. As far as the decision-maker is concerned, my experience is that because of the opportunity to observe the experts in conversation with each other about the matter, together with the ability to ask and answer each others questions, the capacity of the judge to decide which expert to accept is greatly enhanced. Rather than have a person's expertise translated or coloured by the skill of the advocate, and as we know the impact of the advocate is sometimes significant, you actually have the expert's views expressed in his or her own words. There are also benefits when it comes to writing a judgment. The judge has a transcript where each witness answers exactly the same question at the same point in the proceedings.

I am sometimes asked, particularly by advocates, whether concurrent evidence favours the more loquacious and disadvantages the less articulate witness. In my experience, the opposite is true. Because each expert must answer to their own professional colleague, the opportunity for diversion of attention from the intellectual content of the response because of the manner of its delivery is diminished. Being relieved of the necessity to respond to an advocate, which many experts see as a contest from which they must emerge victorious, rather than a forum within which to put forward their reasoned views, the less experienced, or perhaps shy, person becomes a far more competent witness

in the concurrent evidence process. In my experience, the shy witness is much more likely to be overborne by the skilful advocate in the conventional evidence gathering procedure than by a professional colleague who, under the scrutiny of the courtroom, must maintain the debate at an appropriate intellectual level. Although I have only rarely found it necessary, the opportunity is, of course, available for the judge to step in and ensure each witness has a proper opportunity to express his or her opinion.

The Uniform Civil Procedure Rules now provide for concurrent evidence. [13] The Supreme Court has altered the relevant Practice Note to facilitate the presentation of cases so that they may proceed with concurrent evidence from the experts. [14]

The AMA Policy

I referred earlier to the remarks of Dr Nothling. To address the problem the Australian Medical Association has adopted a policy [15] of which the key elements are the joint briefing of experts selected by the parties and the use of court-appointed medical practitioners in the event that a case proceeds to a hearing and complex medical issues remain in contention. The Association would like to see a panel of experts maintained by the court from whom the court expert would be chosen.

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

Fitness, propriety and witness immunity – the case of Professor Meadows

Professor Meadow, an eminent English paediatrician, gave expert evidence for the prosecution in the trial of Sally Clark for the murder of her two sons. The surrounding circumstances were controversial. [16] The evidence, which he gave, relied, *inter alia*, on statistics, which he said suggested that SIDS (Sudden Infant Death Syndrome) was not to be naturally expected in a family such as the Clark family. Clark was convicted. Although the appeal court expressed some reservations as to the relevance of those statistics used in that manner, the convictions were not found to be unsafe.

Clark's father complained to the Fitness to Practise Panel ("FPP") of the General Medical Council ("GMC") that Professor Meadow, in using the statistics in the way he did, had acted outside the scope of his expertise and alleged that his actions constituted serious professional misconduct. The Fitness to Practise Panel agreed and the matter found its way to the Court of Appeal in England. The issues before the court included whether the Panel's decision was correct on its merits. [17] The more significant question of general interest was whether disciplinary proceedings were available in relation to evidence given in a court. The common law traditionally provides immunity from civil proceedings for such evidence. For example, a person may not be sued in defamation for evidence given in court, although the immunity would not preclude criminal prosecution for perjury or contempt of court.

The rationale behind the immunity is to enable witnesses, who are honest and well-meaning, to give evidence "freely and fearlessly, in an atmosphere free from threats of suit from a disappointed client, with the corollary that persons who may be witnesses in other cases in the future will not be deterred from giving evidence for fear of being sued for what they say in court", even though occasionally those who are dishonest and malicious may benefit too. [18] The overarching public interest protected by this immunity is that the administration of justice is not impeded. [19]

The English Court of Appeal concluded that the powers of the fitness to Practise Panel have the purpose of protecting the public and upholding professional standards. There is a public interest in the protection of the public's health and safety. [20] The Court found that the maintenance of the common law witness immunity conflicts with the principle that only those who are fit to practise should be permitted to do so, even in the capacity of an expert witness. Accordingly, the Court held that the evidence of Professor Meadow given at the trial was admissible against him in disciplinary proceedings.

Implications for experts generally

Many professions have similar regulatory and disciplinary mechanisms to medical practitioners. For example, in NSW, psychologists are subject to investigations and scrutiny by the Psychologists Registration Board and Psychologists Tribunal. [21] The essential purpose of these bodies is to regulate the profession for the benefit of the public. In many cases the registration and disciplinary process is provided by statute. Tribunals are often chaired by judges and include professional representatives.

There are, of course, many other professional bodies, which are not regulated by statute. The Institute of Chartered Accountants and the National Institute of Accountants both impose standards of professional conduct, which are enforced by disciplinary tribunals. [22] Members who fail to meet appropriate standards may face sanctions, which include expulsion from the professional body, withdrawal or suspension of their membership and/or certification, a reprimand, a fine or undertaking further training or instruction in professional responsibility. A similar position prevails in relation to engineers. [23]

Apart from the AMA I have not infrequently been asked whether courts should be responsible for accrediting experts who may give evidence before them. The commonly expressed expectation is that courts would thereby be able to exclude witnesses that are neither appropriately qualified, or had failed to give evidence which reflected relevant levels of professional competence or objectivity. There are many difficulties with such a proposal. However, given the frequency with which experts give evidence in courts and the reliance placed on their learning and professional integrity, an increasing interest by professional bodies in maintaining appropriate standards from those who give evidence should be encouraged. Although courts should be reluctant to criticise a witness, where it is appropriate, criticism should be made. If criticism is made warranting disciplinary action, professional bodies should not be reluctant to take that action.

The Court of Appeal said of the disciplinary process in Meadow's case:

"In general the threat of proceedings before a body like the FPP is in the public interest because it helps to deter those who might be tempted to give partisan evidence and not to discharge their obligation to assist the court by giving conscientious and objective evidence. It helps to preserve the integrity of the trial process and public confidence both in the trial process and in the standards of the profession from which expert witnesses come. As stated earlier, the purpose of fitness to practise proceedings is the protection of the public." [24] (emphasis added)

The New South Wales Supreme Court

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

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

I recently sat as the trial judge in relation to a claim by a young lad who was aged 18 at the time he had a cardiac arrest and suffered catastrophic and permanent brain damage. He sued his general practitioner which required the calling of evidence from other general practitioners about the duty of a doctor given the plaintiff's circumstances. There was also a major cardiological issue.

As it happened the parties called a total of five general practitioners. They gave evidence concurrently. They sat at the bar table together and in 1½ days discussed in a structured and cooperative manner the issues which fell within their expertise. They had previously conferred together for some hours and prepared a joint report which was tendered. In all likelihood if their evidence had been received in the conventional manner it would have taken at least five days. I would not have had the benefit of the questions which they asked each other, and, of even greater value, the responses to those questions.

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

Conclusion

The Australian community, as with the communities of other developed countries, increasingly demands efficiency from the processes of government and public corporations. At its core the challenge is to ensure that the issues which need resolution are identified and the available resources are efficiently applied to resolving them. This has meant that the "old" way of doing things must

sometimes be discarded and resources focused on a “new” way. The courts are still accepted as the appropriate place to resolve many disputes amenable to litigation, although critical scrutiny of the litigation process is now common. It will continue. Where problems can be identified the challenge is to respond appropriately to them.

END NOTES

1. Sir Anthony Mason, “The Future of Adversarial Justice” a paper given at the 17th AIJA Annual Conference on 6-8 August 1999
2. See JJ Spigelman, “Measuring Court Performance” an address to annual AIJA conference on 16 September 2006
3. K M Hayne, “Australian Law in the Twentieth Century”, Keynote Address at Judicial Conference of Australia on 13 November 1999
4. For liability to pay compensation under the Workers’ Compensation Act 1987 (NSW) see *ibid* Pt 2. For the award of common law damages see *ibid* Pt 5. Similarly, in relation to motor vehicle accidents, compensation is governed by the Motor Accidents Act 1988 (MAA) and Motor Accidents Compensation Act 1999 (MACA). For accidents occurring (i) on or before 5 October 1999, the award of damages is governed by MAA Pt 6; and (ii) after 5 October 1999 the operative provisions are those contained in Chapter 5 of the MACA.
The Compensation Court was abolished as of 1 January 2004: Compensation Court Repeal Act 2002 (NSW) s 4. The Workers’ Compensation Commission commenced on 5 October 2001: Workplace Injury Management and Workers Compensation Act 1998 Pt 10.
5. McClellan, “Expert Evidence – Aces up your sleeve?” paper given to the NSW IRC on 20 October 2006
6. H K Woolf, “Access to Justice”, Final Report to the Lord Chancellor on the civil justice system in England and Wales, HMSO, London, 1996
7. Federal Court Rules (Cth) Order 34A was introduced by Federal Court Amendment Rules 1998 No 323 and commenced on 7 December 1998. The ‘Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia’ originally commenced on 15 September 1998. See also FCR Order 34 for court-appointed experts and Order 34B for an ‘expert assistant.’
8. UCPR Pt 31 r 31.23 and Sch 7
9. UCPR Pt 31 Div 2 Subdiv 4 (parties’ single experts) and Subdiv 5 (court-appointed experts).
10. For example see Uniform Civil Procedure Rules 1999 (QLD) Pt 5.
11. H Hallett, “Expert Witnesses in the Courts of England and Wales” (2005) 79 ALJ 288 at 291
12. M Nothling, “Expert Medical Evidence: The Australian Medical Association’s Position”, available from: <http://www.aija.org.au/info/expert/Nothling.pdf>, viewed 28 June 2006
13. UCPR Rule 31.35(c)-(h)
14. Practice Note SC CL 5 paras 36-40
15. AMA Policy Resolution on Expert Witnesses, passed 4 February 2005
16. For example, see <http://news.bbc.co.uk/2/hi/health/4114688.stm>, <http://society.guardian.co.uk/nhsperformance/story/0,,1512227,00.html> and related articles therein.
17. *Meadow v General Medical Council* [2006] EWCA Civ 1390, [2007] 1 All ER 1 at [208]-[224] per Auld LJ and [276]-[282] per Thorpe LJ agreeing; at [68], [69]-[96] per Sir Anthony Clarke MR dissenting
18. *Ibid* at [14]-[15] per Sir Anthony Clarke MR; Auld LJ (at [106], [116]) and Thorpe LJ (at [249]).
19. *Ibid* at [16] per Sir Anthony Clarke MR; Auld LJ (at [106], [116]) and Thorpe LJ (at [249]).
20. *Ibid* at [34] per Sir Anthony Clarke MR; Auld LJ (at [106], [116]) and Thorpe LJ (at [249]).
21. See reference to board, tribunal and “protection of the public” in Psychologists Act 2001 (NSW) Pt 6. Similarly see Chiropractors Act 2001 (NSW) Pt 6, Dental Practice Act 2001 (NSW) Pt 7, Optometrists Act 2002 (NSW) Pt 6, Physiotherapists Act 2001 (NSW) Pt 6, Osteopaths Act 2001 (NSW) Pt 6, Podiatrists Act 2003 (NSW) Pt 6.
22. For Institute of Chartered Accountants and National Institute of Accountants see http://www.charteredaccountants.com.au/contact_us and <http://www.nia.com.au/category.asp?categoryID=24> respectively.
23. Institution of Engineers Australia, Disciplinary Regulations (http://www.engineersaustralia.org.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=F06581EA-993E-D565-1F09-82F55DE9920E&siteName=ieaust).
24. *Ibid* at [46] per Sir Anthony Clarke MR; Auld LJ (at [106], [116]) and Thorpe LJ (at [249]).