UNIVERSITY OF OXFORD
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Procedural Justice Discussion Group
Evidence Discussion Group

16 October 2013

CONCURRENT EVIDENCE:

PERSPECTIVE OF AN AUSTRALIAN JUDGE

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Supreme Court of New South Wales

Introduction

1 The purpose of this paper is to discuss the concept of concurrent expert evidence, and to give an individual judicial perspective of the advantages and disadvantages of the concept as it is 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. Hence this is a personal reflection.

Relevant NSW Legislation

2 Civil proceedings in the Supreme Court of New South Wales, are subject to the provisions of the *Civil Procedure Act* 2005 (NSW), and the Uniform Civil Procedure Rules 2005 (NSW)[1].

3 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 Act which is to be found in s56 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.

4 Not only is the Court under an obligation to further the overriding purpose, but so are the parties, and, effectively, so are their lawyers.

5 In the course of case management, the Court is obliged to seek to act in accordance with the dictates of justice: s57 of the Act. Other provisions of

[1] A complete version of the *Civil Procedure Act* 2005, and the Uniform Civil Procedure Rules can be accessed at: www.legislation.nsw.gov.au.

Part 6, Divisions 1 & 2 of the 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 the requirements to which the Court must, and may, have regard.

6 One of the techniques which is 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

7 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 expert opinion evidence which is admissible in accordance with the provisions of the *Evidence Act* 1995 (NSW). 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.

8 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[2]. 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). Importantly, the Code notes that an expert witness is not an advocate for a party.

[2] The complete Code of Conduct is to be found in Schedule 7 of the UCPR

9 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 …"*[3]. It is beyond the scope of this paper to discuss the complexities, and varying theories about the basis for the admissibility of expert evidence and reports. Extensive discussion can be found in a number of Australian cases[4].

10 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*[5]:

> "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 and second-hand views as to the credibility of the

[3] See Allsop J in *ACCC v Liquorland (Australia) Pty Ltd* [2006] FCA 826 at [840]
[4] See *HG v R* [1999] HCA 2; (1999) 197 CLR 414, *Makita (Australia) Pty Ltd* [2001] NSWCA 305; (2001) 52 NSWLR 705, *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; (2011) 243 CLR 588.
[5] *Makita (Australia) Pty Ltd* [2001] NSWCA 305; (2001) 52 NSWLR 705 at [85]

> complainant, and a process of reasoning which went well beyond the field of expertise" (at [41]).”

Expert Evidence: The traditional approach

11 The traditional form of expert evidence in adversarial proceedings is for the evidence to be given individually, and the expert to be cross-examined by the barrister, or barristers for the parties in the opposing interests. That challenge commonly manifests itself in these forms:

(1) A challenge to the expertise, learning or experience of the witness;

(2) A challenge to the facts which have been assumed, in the course of which different assumptions of fact are put to the witness, to obtain a different opinion from that first 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 opinions expressed by the other retained experts.

12 The cross-examiner when challenging the evidence of the expert, was desirably assisted by having one or more of their experts in the well of the Court making suggestions as to questions which might be put, 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.

13 As well, the evidence of 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 restriction on the calling of experts with respect to the unfolding of the factual accounts, so that in may cases, experts were not in possession, and were not asked accurately, to assume one or more plausible versions of the facts. This was commonly so in professional negligence cases where it is often the case that the

evidence of a professional defendant would vary in the course of oral questioning.

14 In those circumstances, parties were often put to the expense of recalling their retained experts to respond to the facts as they had emerged. 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.

15 It will be obvious from this description, that questions about the speed of the trial, the efficiency of it and the cost and expense of it, arose regularly.

Concurrent Evidence: The Concept

16 As I have said earlier, the use of concurrent 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.

17 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[6], next to each 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.

18 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.

[6] In the recently refurbished Court building there are facilities to take up to 6 witnesses concurrently in a single witness box. If specific facilities are not available, then use of the jury box, or Bar table is not uncommon.

19 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.

Concurrent Evidence: Preparation

20 Preparation for concurrent evidence commences after the parties have obtained, and served reports from their retained experts which reveal differing opinions upon which the Court will be asked to decide. Once that has happened, then judicial case management is engaged to oversee the detail of the preparation for the joint conclave, and ultimately the oral evidence.

21 The time at which judicial case management is engaged occurs is a matter of considerable variation, and is very much case dependant. For my part, I prefer this step to occur, once a final hearing date has been fixed, and at least three months before that date, and preferably, not more than six months.

22 It is my practice to require from each of the parties a number of documents. They are:

- A statement of all of the assumptions of fact for which each party contends;
- 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.

23 The statement of the factual assumptions is an almost entirely party specific matter, because 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. Accordingly, they are best placed to formulate the assumptions. The real role of the Court at this stage is to ensure that these assumptions are truly matters of fact and are not matters of law, or matters which are wholly irrelevant to the proceedings.

24 The list of issues 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 the agenda for the oral evidence.

25 In those circumstances, in my view, it is undesirable to frame the issues as questions as though they were interrogatories being asked of the experts. 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.

26 In my view, asking issues in this way which is more akin to the delivery of joint interrogatories tends to constrain, rather than enable, the experts in a joint conference, expressing their opinions, and by mutual discussion, determining whether the opinions on various issues are the same or can be agreed or whether there is a fundamental difference between them leading to their ultimate non-agreement on one or more of the issues posed.

27 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.

28 Finally, I note in passing that it is not appropriate, in my view, to ask direct questions of the experts which are matters of law which are appropriately reserved for the trial judge.

29 The preparation of a common index to, and then a bundle, of documents which are given 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 of the same information.

30 Once these documents have been finalised, then it 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

31 The joint conclave is a conference attended by the relevant retained experts, without the presence of lawyers for the parties, at which the experts consistently with the Code of Conduct, discuss the issues and attempt to reach agreement on some or all of those issues where possible.

32 It is highly desirable that the joint conclave takes place with all of the experts together in the same room. However, geographical and cost constraints sometimes mean that this cannot be achieved. In such cases, the joint conclave can be held by an audio-visual link, or by telephone.

33 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 end position.

34 The confidentiality of the process also mean that a party which is disappointed by a change in the position of a retained expert cannot call that expert to account by requiring to know of the contents of the discussion. Allowing that to happen would also be to 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, 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.[7]

35 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 circumstances in which this has become necessary vary. On some occasions, it is felt that the very number of experts attending the conference is sufficient to justify that course. In particular, the role of the Chair is to ensure that the views of each participant are recorded, and the agreement of the meeting clearly expressed. On other occasions, the personalities of the experts involved, particularly in small fields of practice, meant that having a neutral Chair will ensure that the conference is conducted efficiently, or politely. The Chair can be a person from the profession involved in the joint conclave. Equally, it may be a senior barrister, or retired judge.

36 The role of a Chair is of real usefulness 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, without that person trying to participate but not having an adequate opportunity. 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 a discipline in the conclave, or a structure which ensures the completion of the task.

37 What is important to the role of the Chair is to have someone who oversees the process of the joint conclave and preparation of the joint report, rather than someone who feels entitled to, and does, participate in the substantive discussion.

38 As well, the provision of administrative assistance is also permissible to ensure that the joint report is prepared promptly, desirably by the end of

[7] *Cabassi v Vila* [1940] HCA 41; (1940) 64 CLR 130 at 140 per Starke J, *D'Orta-Ekanaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1 at [39] – contra *Jones v Keney* [2011] UK SC 13; [2011] 2 AC 398

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, 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.

39 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.

40 The end product of the joint conclave is the joint report.

Concurrent Evidence: The Joint Report

41 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) This rule applies if expert witnesses prepare a joint report as referred to in rule 31.24 (1) (c).
>
> (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.

42 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 conventionally, will it comply with the rules of admissibility for expert opinions. But that is to consider it to be something which it is not intended to be.

43 The expert reports which are truly admissible in form and which set out the detailed reasoning of the expert, are those which were 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.

44 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.

45 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

46 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 Court, 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.

47 In 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.

48 I also remind the witnesses that their task whilst participating in the concurrent evidence session 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.

49 After this explanation, is concluded, then the witnesses are identified and sworn, and their concurrent evidence session proceeds. 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.

50 Commonly the trial judge will commence by establishing to their satisfaction what the state of agreement is with respect to the first issue, and then by a process of careful questioning elicit the other opinions and the basis for them. The trial judge will, if appropriate seek an explanation of why an opinion is held, and why the differences exist. As that develops, it is quite common for the trial judge to call on the opposing expert to explain their view and the basis for it, and then to 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 properly comments by one witness on what the other witness has said. The aim of this is to establish a real professional

dialogue on the issues which are disputed to ensure that the judge is adequately informed of the expert opinions.

51 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, much like the control by a chair of a meeting, although all necessary formality is observed.

52 Accordingly, after the judge has finished raising any matters which they wish to, 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 are to ensure that an expert's opinion is fully articulated and tested against a contrary opinion.

53 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 usually difficulty in managing the hearing.

54 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 of fully explaining their position and adding anything relevant which may have been overlooked.

55 In cases involving concurrent evidence, at least where a judge sits without a jury, there is no reason for a judge not to "*intervene to control, to clarify or to make known a provisional view*" in the course of the expert evidence[8].

[8] *Botany Bay Council v Rethman Australia Environmental Services Pty Limited* [2004] NSWCA 414 per Tobias JA at [46].

Concurrent Evidence: A Question of Timing

56 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 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. This may have some consequence for the making of a decision whether to call any evidence or not.

57 Frequently, a defendant will attempt 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 is 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 closed.

58 In considering the timing of the concurrent expert session, the issue becomes whether the court ought require that all of the relevant witnesses of fact to be called by all of the parties give their evidence before the concurrent evidence? 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 co-incidence 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*[9]*:*

> 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

[9] *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA 58 (1985) 59 ALJR 844

> 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 cited by Samuels J.A. in the Court of Appeal (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.

59 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 a coincidence between the proved and assumed facts.

60 This is very significant in cases where unexpected factual evidence has emerged during a defendant's case, because it means that an expert retained for a plaintiff, does not have to be recalled to give further expert opinion evidence based on the newly revealed, or established facts.

61 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 occasions, I have permitted a trial 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 then begin. This means that there may be a break of many weeks between the phases, which itself has disadvantages. This phased trial process is in the early stage of development as a case management technique.

Some Reflections

62 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.

63 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 of litigation, 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.

64 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 my 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 blame either an expert or the process when unfavourable evidence was given in the course of the process of concurrent evidence.

65 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.

66 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.

67 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 remain in dispute to a significant extent, thereby assisting the decision making process, and 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. 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 their peers with whom they will have further contact in a professional context; 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.

68 This last feature has significant cost savings for the parties, and also means 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 is a real advantage.

69 As a judge, the process of concurrent evidence involves 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 teased out. However, this additional preparation is off-set two principal advantages, namely that it is necessary for the judge to fully comprehend the expert opinions to write their judgment, and so the reading and understanding takes place at an earlier time, and importantly, any misunderstandings 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 from the experts.

70 Speaking extra-judicially, Justice McClellan formerly the Chief Judge of the Common Law Division of the NSW Supreme Court, and one of the early proponents of the process, said[10]:

> As far as the decision-maker is concerned, my experience is that because of the opportunity to observe the experts in conversation

[10] Law Institute of Victoria, Medicine and Law Conference: 29 November 2007. Available at http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/mcclellan_2007.11.29.pdf

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

Conclusion

71 In the three years, or so, since becoming a judge, I have conducted many trials with the use of concurrent evidence. 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[11]. 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.

72 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 disappeared. Complex expert issues are able to be identified and dealt with more effectively and with a greater understanding of them.

73 From my perspective, in my current role, it is a most worthwhile process.

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[11] 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