By Christopher T Barry QC

THE NSW EXPERT EVIDENCE REGIME

Some practical observations

The Uniform Civil Procedure Rules (UCPR) came into operation in the Supreme Court of New South Wales in 2005. They have since been modified in a number of respects to enable the Court to further control the way in which expert evidence is utilised in the Supreme Court of New South Wales.

This article does not set out to analyse the construction of the rules or the body of case law that has since developed but, rather, to make some observations based upon the writer's experience of what the practical effect of these changes has been and how the rules may best be used by parties wanting to rely upon expert evidence.

CASE MANAGEMENT

The first point to note is the dramatic shift from parties being able to retain and use expert witnesses in a manner that they choose, subject to minimal procedural requirements, into a tightly regulated and court-managed system. New South Wales has the most rigorous regime for the management of expert evidence of all the states and territories. The following examples demonstrate the degree to which the courts now manage expert evidence:

- A party intending to adduce expert evidence has an obligation to seek directions from the court as to how the evidence is to be used.[1]
- The directions that the court gives relate to routine matters such as service, but may also limit the matters about which the evidence can be given and the way in which it is to be given.[2] The court has power to direct the engagement of a single expert but in the writer's experience, at least in personal injury cases, this rarely occurs.[3]
- One novel feature of the rules is the obligation upon an expert witness who is retained on any contingency basis, if the court so directs, to disclose the terms of the engagement including fees and costs to any other party.[4]

The main consequence of the high degree of regulation and court management of expert evidence is that the process becomes more akin to an inquisitorial model than an adversarial model of litigation.

EXPERT WITNESS CONCLAVES

There are particular features of those changes that require discussion. The first is the power of the court to direct witnesses to confer for the purposes of preparing a joint report identifying matters which are agreed or not agreed and the basis for such a report. The rule is clear enough,[5] but the practicalities of compliance have caused difficulty.

These conferences are usually referred to as 'conclaves' and to give practical effect to the rules, the court developed a Practice Note SC Gen 11 which commenced on 17 August 2005. Titled 'Supreme Court – Joint Conferences of Expert Witnesses', it imposes a structure upon the way in which a conclave is to be carried out.

The Practice Note prescribes that the parties:

'should agree on the following matters:

- the experts to attend;
- the questions to be answered; and
- the materials to be placed before the experts.'

As an adjunct to the rules and the Practice Note, the court developed an *Expert Witness Code of Conduct*[6] which is set out in Schedule 7 to the UCPR and which requires each expert witness to agree to comply with the matters set out in that Code including that '*an expert witness must abide by any direction of the court*'.[7] It also requires the expert witness, when directed, to confer with another expert witness to '*endeavour to reach agreement with the other expert witness on*' an issue and specifically requires that the expert '*not act on any instruction or request to withhold or avoid agreement with the other expert witness*'.[8]

The Code of Conduct also has detailed provisions as to what is to be contained in the experts' reports dealing with matters that would be expected to be included such as qualifications and experience, but it also specifically requires the identification of any facts or assumptions of fact upon which the opinions in the report are based and an exposition of the reasons for the opinions expressed.

The Practice Note obliges the parties to provide '*secretarial or administrative assistance*' '*if so requested by the experts*' and obliges the experts to prepare a joint report.

EXPERT WITNESSES' JOINT REPORT

In practice, what has happened in the NSW Supreme Court is that these meetings have occurred either in person or, quite often, by telephone hook-up, and one of the experts has agreed to be the lead author for the joint report. He or she then prepares a draft of the matters required to be dealt with and distributes it to the other parties for their concurrence which, once settled by all parties, becomes the report.

In practice, what the parties and the court usually receive is a statement of answers to the questions asked and a statement of reasons for any disagreement.

Disagreement most frequently arises as a result of differences about matters of primary fact assumed on behalf of one party but not accepted by one or other of the experts.

What in fact tends to happen to deal with this problem is that when the questions are formulated for the opinion of the experts at the conclave, parties with different primary facts in their cases formulate questions for the experts based upon those facts. The experts are then required to assume each competing party's factual case for the purposes of expressing an expert opinion. >>

> The new expert evidence regime makes for a more inquisitorial than adversarial model of litigation and effectively transfers costs from the public to the private purse.

The effect of this is that once the trial judge has decided the disputed question of primary fact, any expert evidence required to determine the ultimate issue may be treated as agreed between all experts.

Some practitioners have expressed concern that the process described above effectively delegates judicial power by the court to the experts but, in reality, this has turned out not to be the case, provided that the specific requirements of the rules, the Practice Note and the Code of Conduct are adhered to.

Once the conclave has been completed and the report is prepared, the report may be tendered at the trial as evidence of any matters agreed.[9]

In practice, the whole of the report is often tendered, even though the rule limits what might be admitted as to matters that are agreed, unless matters not agreed would otherwise be admissible *'in accordance with the rules of evidence and the practices of the court'*.[10]

Interestingly enough, although the practice of ordering conclaves and the preparation of joint reports has become almost universal in the Common Law Division of the NSW Supreme Court, the individual expert's reports may independently be put in evidence, notwithstanding the existence of a joint report. Provided the report is served in accordance with the court rules,[11] the report becomes admissible.[12]

PRE-TRIAL RULINGS ON ADMISSIBILITY OF EXPERT EVIDENCE

One fertile ground for interlocutory disputes that has arisen as a result of these changes to the rules is (prior to the trial) the utilisation of s192A of the *Evidence Act*, which permits a court to make advance rulings in relation to the admissibility of any report.

What not infrequently happens is that a particular expert witness report is alleged not to comply in some respects with the specific requirements of the rules of Court, the Practice Note or the Code of Conduct and there is then an interlocutory argument as to the admissibility of some or all of the particular expert's report in advance of the trial.

The usual argument is that there has not been a compliance with the requirements as far as the identification of factual assumptions are concerned, or there has been a failure to comply with the obligations relating to the exposition of the reasoning process contained in the report leading to the conclusion.

The development of this practice produces the somewhat surprising result that one judge can determine questions of admissibility, yet another judge will actually hear and decide the case based upon the earlier judge's determination of admissibility.

CONCURRENT EVIDENCE OF EXPERTS

Another novel feature of the operation of the new regime that warrants discussion is the process of 'concurrent evidence',[13] colloquially referred to in New South Wales as a 'hot tub'.

In practice, if there is a jury box in the courtroom, the witnesses on a particular area of expertise take a position in the jury box and are sworn in, as if they were members of a jury.

If there is no jury box, the experts then sit at the Bar table with counsel relegated to opposite ends of the Bar table facing each other but not towards the judge.

In the early years of concurrent evidence in the Common Law Division of the NSW Supreme Court, different judges adopted different approaches as to whether they would ask the first series of questions. Over time, the practice has developed whereby the trial judge will usually start by thanking the witnesses for their attendance and co-operation, and then try to identify matters which the judge thinks appear to be significant arising from the joint report. This is a difficult and delicate task for a judge to perform and gives rise to a risk of the judge being seen to be entering the arena of the dispute if the intervention is too specific or protracted. The involvement of the trial judge in the exploration of the matters in dispute is conduct that in itself demonstrates how the process has moved from an adversarial process to an inquisitorial process.

There has been no uniformity of approach as to how counsel then questions the expert witnesses giving 'concurrent evidence'.

Some judges prefer to give opposing counsel an opportunity to ask questions in turn on specific matters. Other judges simply permit counsel to ask questions on all issues of all of the experts at the same time. Counsel for the plaintiff goes first, followed by counsel for one or more defendants with a right to 're-examine' by counsel for the plaintiff.

Some judges permit counsel to continue to question one after the other without following the usual strictures of examination-in-chief, cross-examination and re-examination that used to prevail in the conventional adversarial process.

Some judges permit the process to continue until counsel for all parties have exhausted all the questions that they want to ask of all of the witnesses, irrespective of the order in which counsel commenced their questioning.

It is common for trial judges to interrupt the 'cross-examination' to ask other witnesses their views on a particular issue. The traditional method of counsel 'pursuing' a witness using a carefully structured cross-examination is a thing of the past.

Once the 'concurrent evidence' is concluded, the trial then resumes the ordinary features of an adversarial process under which the non-expert witnesses, if any remain, are then called in the usual way.

COMMENTARY ON THE NEW EXPERT WITNESS REGIME

To my mind, this new regime has dramatically changed the way in which litigation involving expert witnesses has occurred in a number of important respects.

Firstly, the process becomes 'issues-driven'. By that I mean that particular areas of dispute or agreement are isolated and these become the focus of examination both by the court and by counsel.

The second feature is that the right to effectively cross-examine, and in particular, to cross-examine as to credit, is diminished, if not removed altogether so that, in effect, what often happens is that the process becomes one of serial examinations-in-chief by counsel for various parties.

To alleviate the disadvantages associated with the inability to properly cross-examine witnesses giving evidence adverse to the party for whom counsel appear, shrewd counsel have often used their own expert as a mouthpiece. For example, once an unfavourable piece of evidence has been given by an expert retained on behalf of a party, then counsel on the other side asks his expert to comment upon the opinion just expressed by the adversary's expert, thereby, in effect, using his own expert as the mouthpiece for the contradictory opinion.

A third feature of the new evidence regime is that there is a tendency to produce what in effect are 'compromise' opinions. Because of the obligation to reach agreement, particularly in areas which might involve quantification of particular heads of damage in a personal injury case, what frequently occurs is that the experts agree on some 'compromise' whereas, under the previous adversarial system, judges tended – where the evidence supported it – to accept the evidence of the plaintiff's experts if the plaintiff was otherwise believed. This necessarily produced the result that there were higher awards of damages in the previous system than occurs in the new regime.

The risk of 'compromise' opinions is enhanced if, as sometimes happens, one party finds out the identity of the other party's expert witness and then retains, as their expert, that person's 'supervisor'. Sometimes, someone within the same institution who has a higher rank than the first expert is retained in the hope or expectation that the more junior person will therefore defer to the opinion of the more senior person.

The final matter of concern is the added financial burden created by compliance with the new expert evidence regime. In effect, it involves a massive transfer of the costs of litigation from the public purse on to the private purse. Under the earlier adversarial regime, it was court time that was expended by witnesses being called one after the other and examined in chief, cross-examined and re-examined in the usual way. Under the new expert witness regime, areas of dispute between experts are isolated and dealt with before the case gets to court. This reduces court hearing time but increases the cost of pre-trial procedures.

CONCLUSION

These observations do not purport to be an exhaustive analysis of the new regime but are intended to give some assistance to readers from states and territories other than New South Wales. In this writer's opinion, the New South Wales practices or something akin to them are likely to be adopted in other states and territories which do not as yet have such a regulated and court-managed regime. The reason for this view is that this regime reduces the costs of the court system and is favoured by judges because it narrows the amount of time required by them to resolve disputes between parties where there is a conflict of expert opinion evidence. Putting it bluntly, it makes the judge's job easier. ■

Notes: **1** UCPR Part 31 rule 31.19. **2** *Ibid,* rule 31.20. **3** *Ibid,* rule 31.20(2)(g). **4** *Ibid,* rule 31.22; see *Fuller-Lyons v State of New South Wales (No. 2)* [2013] NSWSC 445. **5** *Ibid,* rule 31.24. **6** *Ibid,*1 rule 31.23. **7** UCPR Schedule 7 clause 3. **8** *Ibid,* clause 4. **9** Part 31 rule 31.26(3). **10** *Ibid,* rule 31.26(4). **11** *Ibid,* rule 31.28. **12** *Ibid,* rule 31.29. **13** *Ibid,* rule 31.35.

Christopher T Barry QC *is based at Selborne Chambers, Sydney.*
EMAIL *barryster@selbornechambers.com.au.*

ARW
australian
rehabworks
COMPLEX TO CATASTROPHIC INJURY SPECIALISTS
Completed by Experienced Occupational Therapists and Physiotherapists
- Adult and paediatric brain injury
- Adult and paediatric spinal cord injury
- Simple to complex orthopaedic injuries
- Medical negligence claims
- Amputees
- Nervous shock/psychological injuries

We provide cost of care reports and can meet urgent requirements and turn around times
To make an enquiry phone our office or email admin@arworks.com.au
PHONE: 02 9958 6410